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The peculiar value of oral argument is very often greatly underestimated not only by lawyers but also by judges on the bench. How often one observes an attorney carelessly "making a few remarks" to the court and wasting a most precious opportunity to incline the mind of the judge in his favor which not even the most laborious and painstaking brief could even be expected to do. The later generation of lawyers seem to rely more upon the logic of cold type than of burning words addressed to the ear of the court. This tendency of the bar is regretted by Mr. Justice Harlan of the Supreme Court, in a statement made to a correspondent of the *New York Evening Post*, as follows:

"It is a matter of serious regret and concern to this court that the practice of oral argument appears to be falling into disuse. The idea seems to have become general among members of the bar that we prefer arguments presented in the form of written briefs. Such is not the case. There are many times when nothing can take the place of the personal presentation. Briefs are well enough in their way, but it very often happens that the real point upon which a case turns may be overlooked in a brief, while an oral argument may serve to bring it home to the court. A special emphasis, a striking simile may throw new light on an intricate problem, and perhaps reverse a judgment in the mind of the court."

In commenting on this, the *American Law Review*, says:

"The Supreme Court of the United States have always set high value upon oral argument, and difficult cases are often ordered down for reargument by that court. Two hours on a side are allowed for argument, and in cases of great importance, the time is extended. During the argument the judges frequently ask questions, tending to clear doubts in their minds. It is a pleasure to listen to a good argument in the supreme court. The fretfulness and impatience of argument which are discovered in some other appellate courts does not exist there at all."

Perhaps the "fretfulness and impatience" of judges, and especially judges of *nisi prius* courts is the lack of preparation on the part attorneys. Oral argument in the general run of it to-day is, in most cases, exceedingly tedious and commonplace and is undoubtedly a great weariness of the flesh to even the most patient judge. How different it was with men like Choate and Webster by whose burning eloquence not only juries but the courts themselves were captivated and constrained to view the law and the facts in the light in which these great advocates saw them. The idea which prevails to a very large extent that judges cannot be moved by the eloquence which would appeal to a jury, is fallacious and ought to be exploded. Judges are human, even with all the classical coldness sometimes assumed by them, and the earnest advocate with his intellectual batteries well primed and his whole nature on fire with zeal for the cause he represents is most likely to overcome the heart and mind of either judge or jury. A revival of forensic argument and a more careful preparation therefor on the part of advocates would greatly lighten the burden of the court in understanding the real point in issue and in arriving at a decission in harmony with the justice and law of the case.

If one question in this country ought to be definitely settled it is that the manufacture and sale of intoxicating liquors is not a natural right protected by the constitution, but is a recognized evil to be suffered or licensed to exist by the people for a consideration. It is held as a favor, which, like all favors, "must be received upon such terms and conditions, and subject to such burdens and inconveniences, as the donor thinks proper to impose and the donee elects to accept." In the recent and important case of State v. Bixman, 62 S. W. Rep. 828, the Supreme Court of Missouri was called upon to wrestle with this question in the form of a state inspection tax. Act of May 4, 1899, declared that beer and malt liquors can be manufactured or sold in the state only on condition that they shall be made from certain specified cereals and that they shall be inspected and a certain amount paid to the state on each gallon inspected. This

the court held to be a proper exercise of the power of the state, since the manufacture and sale of such beverage is detrimental to public morals, and the legislature has arbitary power to prohibit such manufacture and sale absolutely if it so desired. In answer to the objection that the fee charged for inspection purposes was largely in excess of the costs of such inspection, the court held that the doctrine that an inspection law cannot be legitimately employed to yield a revenue beyond the cost of inspection has no application to a law regulating the manufacture and sale of beer and malt liquors. To the objection that the act interfered with the rights of interstate commerce, the court held that under Act of Congress, August 8, 1890, declaring that all intoxicating liquors transported into a state, on arrival therein are subject to its laws enacted in the exercise of police powers, that part of the act prohibiting the sale of beer or malt liquors till the same are inspected, and the fee therefore paid to the state, is not in violation of the rights of congress over interstate commerce.

NOTES OF IMPORTANT DECISIONS

ATTORNEY'S FEES AS PREFERRED CLAIMS.—On first thought most attorneys would be very much inclined to take exception to the holding of Caldwell, J., in the recent case of Latta v. Lonsdale, 107 Fed. Rep. 585, that a lawyer employed by a railroad company on a yearly salary is not a laborer or employee of the corporation entitling him to a preference over other creditors. The court sums up the question in the following words:

"A lawyer employed by a railroad company on a yearly salary, payable monthly, is not a laborer or employee, within the meaning of the sections quoted. Cent. Dict. tit. 'Wage'; Lewis v. Fisher, 80 Md. 139, 30 Atl. Rep. 608; Casualty Ins. Co.'s Case, 82 Md. 538, 566, 34 Atl. Rep. 778; Bristor v. Smith, 158 N. Y. 157, 53 N. E. Rep. 42; *In re* Stryker, 158 N. Y. 526, 530, 53 N. E. Rep. 525; Bristor v. Kretz, 49 N. Y. Supp. 404; Vane v. Newcombe, 132 U. S. 220, 237, 10 Sup. Ct. Rep. 60, 33 L. Ed. 310; Railroad Co. v. Wilson, 138 U. S. 501, 505, 11 Sup. Ct. Rep. 405, 34 L. Ed. 1023; 3 Thomp. Corp. § 3145. It is very generally believed that corporation lawyers have the opportunity, and are quite able and capable of taking care of themselves when their clients fail, and statutes of the character quoted are not enacted in their interest, but for the protection of wage earners proper, who are laymen, and who have neither the position nor the opportunity nor the capacity to obtain payment or security for their services which the lawyer of the corporation has."

ADVERSE POSSESSION OF GRANTEE UNDER FORECLOSURE SALE.—The running of the statute of limitations in perfecting a title by adverse possession has always managed to come up in some changed form as a mooted question of law. In the recent case of Stout v. Rigney, 107 Fed. Rep. 545, it was held that one who enters upon land under a trustee's deed which purports to convey an absolute title, and which was executed upon a sale by the trustee in a mortgage, the purpose of which was to bar the mortgagor's equity of redemption, must be regarded as holding adversely to the mortgagors from the time his deed is recorded, and possession is taken thereunder, although the sale made by the trustee was irregular or premature; and no actual notice to the mortgagor of the adverse nature of his claim is necessary to invoke the running of the statute of limitations for its protection. The court said:

"We do not believe it to have been essential to render their possession adverse that they (the purchasers at the foreclosure sale) should have notified the complainant that they were holding the land adversely, and would dispute her right to redeem, inasmuch as the entry was made under a deed which purported to convey an absolute title, and which also professed to foreclose her right to redeem. In the case of Rogers v. Brown, 61 Mo. 187, 195, it was ruled, among other things, that the grantee under a fraudulent conveyance would be regarded as holding adversely to creditors who had challenged the validity of the conveyance from the time his deed was recorded, and we perceive no sufficient reason why one who enters upon land under a trustee's deed which purports to convey an absolute title, and to have been made with a view of barring the mortgagor's equity of redemption, should not be regarded as holding adversely to the mortgagor from the time that his deed is recorded and possession is taken, although the sale made by the trustee was irregular or premature. The precise question last suggested arose in the case of Miner v. Beekman, 50 N. Y. 337, 344, in which case it was decided that the statute of limitations began to run against the purchaser of the equity of redemption, who had not been made a party to an action of foreclosure which was brought against the mortgagor, from the time the mortgagee entered into possession as a purchaser under the defective decree of foreclosure. Our conclusion is, therefore, that the complainant's right to redeem was effectually barred by the statute of limitations long before the present bill was filed."

MASTER AND SERVANT — SCOPE OF SERVANT'S EMPLOYMENT.—One of the most difficult questions with which courts and juries have to wrestle arises out of the relation of master and servant in determining whether a certain act committed by a servant for which the master is sought to be

held liable, is within or beyond the scope of his employment; if the latter, the master is, of course, in no sense liable. No dogmatic rule can be laid down which will solve every statement of facts that may arise, but each case rests upon its own facts, and is decisive of nothing beyond an exactly similar state of facts. In the recent case of Wabash Railroad Co. v. Linton (Ind.), 60 N. E. Rep. 313, the question arose in an interesting form. It was an action against a railroad company for injury to a horse. The complaint alleged that, while the horse was on the railroad track, defendant's servants, riding on a hand car, willfully and intentionally frightened the horse by making loud noises, and willfully and intentionally drove him along the track between the rails at great speed, by shouting and rapidly following him with the car, to a culvert crossing the track, into which he fell, and was injured. Held, that the complaint did not state a cause of action against the railroad company, since the willful acts of its servants complained of were not shown to have been instigated by or committed for the defendant, or in the line of the servant's duty. It will be observed from the reading of the complaint that the appellee has at no place charged the appellant with the commission of any of the acts for which he seeks to hold appellant liable. The charge in either instance is that the act or acts were done by the agents and employees of the appellant, and it does not appear at any place in the complaint that such agents or employees in the commission of such acts were acting in the line of their employment, or that they were doing what they were hired to do, or were acting under the direction of the appellant. It seems to be well settled that neither a willful and tortious nor negligent act resulting in injury, if done by an agent acting without the course of his employment, can be the subject of recovery against the principal. Railway Co. v. Kendall, 138 Ind. 314, 36 N. E. Rep. 415; Railway Co. v. Palmer, 13 Ind. App. 162, 39 N. E. Rep. 881, 41 N. E. Rep. 400; Helfrich v. Williams, 84 Ind. 553; Railway Co. v. Savage, 110 Ind. 156, 9 N. E. Rep. 85; Railway Co. v. Wood. 113 Ind. 544, 14 N. E. Rep. 572. 16 N. E. Rep. 197; Wood, Mast. & S. § 205; Railway Co. v. Peterson, 144 Ind. 214, 42 N. E. Rep. 480, 43 N. E. Rep. 1; Brown v. Engineering Co., 166 Mass. 75, 43 N. E. Rep. 1118, 32 L. R. A. 605.

CORPORATIONS—LIMITATION ON THE RIGHT TO AMEND BY-LAWS.—An interesting point of law is discussed in the recent case of Wooten v. Interstate Building & Loan Association, 38 S. E. Rep. 738, involving the right of a corporation to amend or repeal a by-law, when such repeal or amendment would impair the obligation of any contract between the corporation and its stockholders. In this case an advance was made to a borrowing member of a building and loan association in accordance with the terms of existing by-laws, under one of which he was accorded the privilege of discharging his indebtedness to the association on the basis of the payment by him of 84 monthly installments of dues and interest. It was held that the vested rights of the stockholder, under his contract of loan, to avail himself of this privilege, could not be defeated by any subsequent change in the internal law of the association whether effected by an alteration in its by-laws or through an amendment to its charter. The opinion of the court is an exceedingly valuable annotation on this very close question. The court said:

"Unquestionably, it is within the power of a corporation to pass such by-laws as are not inconsistent with its charter and the purposes for which it was created; and, as an incident to this power, a corporation may be said to have the right to alter, amend, or repeal its by-laws from time to time as the exigencies of the occasion may render necessary and proper. But even an express grant of authority thus to effect changes in its by-laws does not carry with it any right to exercise such authority in violation of the fundamental law of the land. It is to be remembered that our federal constitution in terms provides that no state shall have power to pass any 'law impairing the obligation of contracts' (Const. art. 1, § 10); and it follows, of course, that a statute which provides generally that a corporation shall have authority to alter its by-laws from time to time is not to be understood as contemplating that the authority thus conferred may be exercised in such manner as injuriously to affect the vested rights of any person between whom and the corporation there exists a contractual relation. To otherwise construe such a statute would be to necessarily pronounce it unconstitutional, and therefore wholly inoperative. Clearly, a corporation cannot assume to exercise any right which it was not within the power of its creator to bestow upon it. So it is that 'a by-law cannot disturb a vested right any more than a statute; indeed, they are, in this respect, on the same plane. And, although a corporation has the power of amending its by-laws, yet, inasmuch as they enter into and form a part of the contracts it makes with its members, they cannot, under the guise of amending its by-laws, impair the obligation of such contracts. Thus, a resolution of the board of directors, or an amendment to the constitution of a building association, which modifies the rights of borrowing members, * * * is *ultra vires*.' See Thornt. & Bl. Bldg. & Loan Assns., § 131, and cases cited. 'If a by-law permit withdrawals when a member joins a society, he cannot be deprived of that privilege thereafter without his consent.' Association v. Lewis, 1 Colo. App. 127, 27 Pac. Rep. 872; Auld v. Society, 12 App. Cas. 197. Though amendments 'which do not increase his obligations, but provide a different method of withdrawing, are valid' (Hekelnkaemper v. Association, 22 Kan. 549) further say the authors of the text-book just cited. See, also, in this connection, 7 Thomp. Corp. § 8729, and End. Bldg. Assns., § 272.

"We find in the second edition of 4 Am. & Eng. Enc. Law, p. 1047, the following statement: 'As to the question whether a by-law granting a right of withdrawal can be altered so as to take away or modify that right, the courts are at variance. It has been held, on the one hand, that such a by-law creates a vested right, and that any attempt to change it will be ineffectual. On the other hand, it has been held that an association having power to change its by-laws may make the alteration in question, as the member holds his membership rights subject to having them modified by the body of which he forms a part.' It is worthy of note that in support of the doctrine that 'such a by-law creates a vested right' American cases are cited, while English decisions alone are referred to as authority for the counter proposition. In the case of Pepe v. Society (1893), 2 Ch. Div. 311, it appeared that: 'By one of the rules of the society, a member, on giving one month's notice in writing, might withdraw his shares. The rules also provided that they might be altered by a majority of three-fourths of the members. The plaintiff gave the requisite notice of withdrawal; but after such notice, and before he was repaid, the above rule was altered by giving the directors power to pay off in priority members holding less than £50 in the society.' Under these facts the court reached the somewhat remarkable conclusion 'that, although the plaintiff had, at the date of his notice of withdrawal, under the rule then in force, a vested right to be paid the amount due on his shares, he, being still a member of the society, was liable to have this right devested by a subsequent alteration in the rule duly made, and that he was therefore bound by the altered rule.' This decision, and others of like import, seem to have been predicated upon the idea that under the 'Building Societies Act of 1874' 37 & 38 Vict. c. 42, an association chartered thereunder had authority to change its by-laws at any time, even after its members had acquired vested rights in the premises. See Davies v. Society, 61 Law T. (N. S.) 680; Bradbury v. Wild (1893) 1 Ch. Div. 377; Barnard v. Tomson (1894), 1 Ch. Div. 374; Kemp v. Wright (1894), 2 Ch. Div. 462; Botten v. Society (1895), 2 Ch. Div. 441. Tested by our fundamental law, a statute of that character would be clearly unconstitutional. Fisher v. Patton, 134 Mo. 32, 52, 33 S. W. Rep. 451, 34 S. W. Rep. 1096. It is undoubtedly true that a corporation may, if it so desires, expressly reserve to itself the right to prescribe from time to time how its business shall be conducted; and one subscribing to stock upon the understanding that such right may be exercised in a legitimate manner cannot be heard to assert that by-laws of force at the time he became a shareholder set forth the terms of his contract with the corporation, and therefore cannot be amended or repealed without his consent. Thornt. & Bl. Bldg. & Loan Assns., § 131, pp. 129, 130; Bogards v. Insurance Co., 79 Mich. 440, 44 N. W. Rep. 856; Supreme Lodge v. Knight, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409; Supreme Commandery v. Ainsworth, 71 Ala. 437; Bearden v. Association (Tenn. Ch. App.), 49 S. W. Rep. 64. That is to say, an agreement of this nature will be effectual, provided, of course, it does not militate with some special enactment on the subject; such, for example, as a statute which, in effect, declares, as matter of public policy, that the right of a member of a mutual association to withdraw therefrom upon specified terms and conditions is one which cannot legally be waived. 7 Thomp. Corp. § 8729; Latimer v. Investment Co. (C. C.), 81 Fed. Rep. 776."

After discussing these general principles applicable to all corporations, the court proceeds to prove their special application to building and loan associations: "It is to be borne in mind that one of the distinguishing characteristics of a mutual building and loan association, as compared with private corporations in general, is that in duly transacting its legitimate business, such an association ordinarily deals exclusively with its members. If, after joining an association of this kind under a contract of membership such as that above indicated, a shareholder desires to procure a loan, the terms and conditions upon which the same shall be made to him must necessarily become the subject-matter of another and distinct contract between him and the association. As a general rule, it is agreed that the loan be made in accordance with then existing by-laws prescribing the terms upon which advances may be made to members upon shares of stock held by them. Accordingly such by-laws are to be regarded as setting forth the terms of this special contract (Barbot v. Association, 100 Ga. 681, 694, 695, 28 S. E. Rep. 498), a contract which the association would have no right to repudiate at will, or, by a change in its by-laws, subsequently made, to impair or totally destroy. Becker v. Insurance Co., 48 Mich. 610, 12 N. W. Rep. 874. And, if provision be made in the by-laws then of force that the borrower shall be permitted to thereafter withdraw from the association upon compliance with certain specified conditions respecting the repayment of the loan made to him, it is clear that the privilege thus accorded to him by the express terms of his contract immediately becomes one of which he has a vested right to avail himself at his election. We do not mean to say the association would not be at liberty to stipulate with the borrower, as a condition precedent to making him a loan, that, as to the privilege of withdrawal, or as to like privileges then being recorded to its members, it reserved the right to subsequently effect changes in its by-laws. In the absence of any statutory restrictions in regard to the matter, such a stipulation, if assented to by the borrower, would certainly be binding upon him. In any given case the inquiry should be, what was the contract between the parties? That contract, whatever may be its terms, should, if enforced at all, be given

the effect it was intended to have. This doctrine is in accord with good law, good morals, and common justice."

REMARKS OF COUNSEL AS REVERSIBLE ERROR IN CIVIL CASES.

Introductory.—Success in the trial of a cause is not always measured by the size of the verdict. Frequently counsel whose remarks to the jury have been within the limits of proper argument have greater reason to congratulate their clients and themselves than have they who obtained larger verdicts at the expense of reversible error in speech or conduct. Impropriety of counsel's remarks is one of the common points on which courts of review are asked to reverse judgments. Term after term the question arises, in numerous instances a single volume of reports containing several decisions dealing more or less extensively with the subject. Lawyers and trial judges have been instructed, lectured, reprimanded and rebuked by the appellate court justices who have at times written patiently in this connection on professional ethics, constitutional privileges, Magna Cartar rights and the benefits of jury trials, and again at times disposed of the case with a terse and stern censure. After all these years of admonition and instruction the question still regularly comes to the front. One reason for this is that exact and definite rules cannot be framed relative to trial arguments. The important and valuable privileges of proper argument cannot legally be denied counsel or his clients, and on the other hand, an abuse of the privileges denies the same or equal rights to others. Many factors, like the character of the suit, the conduct of counsel and witnesses on both sides, and the rulings of the trial court, enter into each case, and must be considered with all its other circumstances, and while, therefore, so long as law suits, lawyers and judges differ, no definite rules can be stated by which to determine when counsels' remarks constitute reversible error, and when they do not; still numerous valuable hints and suggestions are to be derived from a careful consideration of the recent decisions on the subject.

What Remarks are Improper.—In a general way it may be stated that the following remarks in argument are objectionable and improper; statements of facts pertinent to the issue which have not been legally elicited upon the trial of the cause; assumptions *arguendo* that certain facts are in evidence in the case when they are not; comments upon papers that have not been put in evidence, upon the facts of newspaper articles, upon excluded testimony, upon former trial or trials of the case, upon the failure of a certain party to testify or to call a certain witness, and upon facts within the knowledge of counsel, and not sworn to in the case; appeals to sympathy or prejudice foreign to the case, like local or religious prejudice, or prejudice against corporations or trusts; reflections upon the character of parties or witnesses and their conduct and credibility when the same are not in issue, and invective and abuse not justified by the evidence.[1] This statement is of necessity not invariably applicable in each particular to every case. What is proper argument in one case might not be in another. For instance, counsel could certainly with propriety use language in a suit for malicious prosecution or libel that would not be proper in an *assumpsit* suit. It follows that whether or not counsels' remarks are ground for reversal is to be determined ordinarily not so much from the language used as from its occasion, the attendant proceedings and the effect. The controlling considerations in recent cases decided by courts of review are therefore not so much the mere words used, except in flagrant and persistent abuses of privileges, as the conduct of opposing counsel relative to

[1] Thompson on Trials, sec. 955, *et seq.*; Weeks on Attorneys (2d Ed.), p. 248; Hilliard on New Trials (2d Ed.), p. 225; 2 Ency. of Plead. & Prac., p. 741, *et seq.*; Tucker v. Henniker, 41 N. H. 317; citing Mitchum v. State, 11 Ga. 634; Berry v. State, 10 Ga. 522; Hodgson v. Scarlet, 1 Holt, N. P. C. 621; Cutler v. Dixon, 4 Coke, 146, note a; Waterer v. Freeman, Hobart, 266; Weston v. Dobriet, Cro. Jac. 432; Astley v. Cooper, 2 Burr. 807, 3 Black, Com. 29, 1 Saund. 130; Elliott v. Luengene, 44 N. Y. Supp. 775, and cases cited. Brown v. Swineford, 44 Wis. 292, citing among other cases, State v. Smith, 75 N. Car. 306; Ferguson v. State, 49 Ind. 33; Pringle v. Miller, 111 Mich. 663; citing Rutler v. Collins. 96 Mich. 510; Hitchcock v. Moore, 70 Mich. 112; Hollywood v. Reed, 57 Mich. 234; Donovan v. Richmond, 61 Mich. 467; Blaisdell v. Davis, 72 Vt. 295, 48 Atl. Rep. 14; Wood v. Agostines, 72 Vt. 51, 47 Atl. Rep. 108; Steen v. Friend, 20 Ohio Cir. Ct. Rep. 459. These citations could be extended to limits not practicable. The decisions upon the general subject of the article are so numerous that usually only those of recent date have been cited.

furnishing cause and to making proper objections, the rulings and instructions of the trial court and the finding of the jury as evidencing the absence or presence of prejudice. These are the invariable quantities so to speak in the problem. What an attorney may say in an earnest and spirited argument is uncertain. Improper remarks having been made, what should be done by opposing counsel, judge and jury can be quite definitely ascertained.

Objections and Exceptions of Opposing Counsel.—It is the duty of counsel for either party, if he desires at any time to object to the remarks of his opponent to do so specifically and at the time the remarks are made. Assignments of error in these regards will not otherwise be considered on appeal,[2] especially if the trial court of its own motion instructs the jury to disregard the remarks.[3] The objection must be both prompt and specific, as it does not avail if made at another time or in a general way.[4] As will be seen later, even a direction on the part of the court that counsel should wait before objecting does not excuse delay by the latter. In case a part of the remarks are proper and a part improper, the objection to avail must point out the particular remarks complained of.[5] Furthermore, objecting counsel loses his rights of exception if he remains satisfied with simply his objection even if it is sustained. He must present the rulings, with his exceptions and an assignment of errors, to the appellate court. If he desires a ruling of the court or an instruction to the jury he must request the same. He cannot afterwards criticise the failure of the court to take any particular action unless he invoked that action.[6] If a written charge is desired it must be requested,[7] and without a direction to the jury an objection is of no avail on appeal.[8] If counsel are allowed to controvert the alleged improper remarks especially after admonition of the court concerning the same, there will be no reversal.[9] If the objectionable remarks were called out by previous statements of opposing counsel, and were in legitimate reply thereto, no ground exists for exception; as for instance, where a corporation's attorney had commented on the unpopularity of corporations, his opponent's improper allusions did not cause a reversal, and where a railroad lawyer commented on the plaintiff's failure to call a specialist, the remarks of plaintiff's attorney on his client's inability to pay therefor were not reversible error,[10] but a statement by the plaintiff's counsel characterizing the defense as audacious does not justify the defendant's attorney in arraigning the plaintiff as a moneyed corporation, intent on crushing the defendant.[11] If opposing counsel fails entirely to call the attention of the trial judge to the remarks, and the latter apparently regards them as unworthy of notice, there will be no reversal.[12]

Rulings and Instructions of the Trial Judge.—Courts of appeal justly attach great importance on the subject of counsels' improper remarks to the rulings and holdings of the trial judge relative thereto. He sees the parties, knows the circumstances, is not

[2] N. O., etc. R. Co. v. Clements, 100 Fed. Rep. 415; C. & E. R. R. Co. v. Cleminger, 178 Ill. 536, affirming 77 Ill. App. 186, and citing L. E., etc. R. Co. v. Middleton, 142 Ill. 550, and Seibert v. People, 143 Ill. 571; Ferguson v. Moore, 98 Tenn. 342; S. & E. T. Co. v. I., etc. R. Co., 51 S. W. Rep. 805; W. C. St. Ry. v. Levy, 82 Ill. App. 202; Monroe v. Lumber Co. (N. H.), 39 Atl. Rep. 1019; Ames v. Partridge (Colo.), 58 Pac. Rep. 341; *In re* Thomas' Estate (Colo.), 56 Pac. Rep. 907.

[3] Monroe v. Godkin, 111 Mich. 183.

[4] Gulf, etc. Ry. Co. v. Brown, 16 Tex. Civ. App. 93; Moore v. Rogers, 84 Tex. 2; Moore v. Moore, 73 Tex. 394; Railway v. Greenlee, 70 Tex. 562; Morrison v. State, 76 Ind. 335.

[5] Gowen v. Bush, 22 C. C. A. 196, distinguishing Railway Co. v. Farr, 6 C. C. A. 211.

[6] Wabash R. Co. v. Mahoney, 79 Ill. App. 53, citing E. J., etc. R. Co. v. Fletcher, 128 Ill. 619; Marder v. Leary, 137 Ill. 323; W. C. St. R. R. Co. v. Sullivan, 165 Ill. 304; W. C. St. R. R. Co. v. Wainatta, 169 Ill. 19, affirming 68 Ill. App. 481, citing Felix v. Scharnweber, 119 Ill. 445; Marder, Luse & Co. v. Leary, 137 Ill. 319; Henry v. C. C. R. Co., 121 Ill. 264; Chicago v. Lesetti, 142 Ill. 642; C. B. & Q. v. Kellogg, 54 Neb. 127; L., etc. Ry. Co. v. Norman, 17 Ind. App. 355, citing Worley v. Moore, 97 Ind. 15; Carter v. Carter, 101 Ind. 450; Choen v. State, 85 Ind. 209; Combs v. State, 75 Ind. 215; L., etc. R. Co. v. McEwan (Ky.), 51 S. W. Rep. 619; Fruchey v. Eagleson, 15 Ind. App. 88, citing C., etc. R. Co. v. Champion, 9 Ind. App. 510; McFadden v. Morn. Jour. Assn., 51 N. Y. Supp. 275; Sutton v. C., etc. R. Co., 98 Wis. 167, citing Andrews v. C., M. & St. P. R. Co., 96 Wis. 348, 361; A., etc. Ry. Co. v. Bagwell, 107 Ga. 157; S. L., etc. Ry. Co. v. Dickens (Tex.), 56 S. W. Rep. 124.

[7] Hogan v. Mo., etc. Ry. Co., 88 Tex. 679.

[8] Andrews v. C., M. & St. P. R. Co., 96 Wis. 361.

[9] Britt v. Burghart, 16 Tex. Civ. App. 78.

[10] McMullin v. Erwin, 69 Vt. 342; Slensby v. Milwaukee St. Ry. Co., 95 Wis. 184; A., T. & St. F. Ry. Co. v. Bryan (Tex. Civ. App.), 28 S. W. Rep. 98; N. Y., etc. R. Co. v. Luebeck, 157 Ill. 595; Belknap v. Groover (Tex.), 56 S. W. Rep. 249.

[11] Pabst Brewing Co. v. Lueders, 107 Mich. 41.

[12] Marvin v. Ruhmohr, 115 Mich. 687.

supposed himself to have been influenced by the remarks, and has in many respects a better opportunity than the appellate justices to determine what harm, if any, the remarks caused.[13] His decision in this regard should be obtained at the trial term.[14] Upon the making of improper remarks, if they are heard by the trial judge, it is his duty of his own motion to interfere,[15] and if he does not it has been held that the omission is tantamount to a ruling, that the remarks were warranted, to which an exception lies without a request for such ruling.[16] The better doctrine is that objecting counsel must ask for the ruling desired. If, however, whether of its own motion or in response to the request or motion of objecting counsel, the trial court takes immediate and decided action, stopping the objectionable remarks, reprimanding the offending counsel and directing the jury to disregard the remarks, there will not ordinarily be cause for reversal, especially if the remarks are withdrawn, as it will be presumed that the jury has followed the court's directions, and there is no presumption of injury in such case.[17] Instruction or direction of the court that the jury disregard counsels' improper remarks, is like the case of the introduction on a trial of objectionable and damaging evidence which the court subsequently strikes out and directs the jury to disregard. "The vice is eliminated and theoretically at least the erroneous evidence found no lodgment in the minds of the jury."[18] Neglect on the part of the trial court to interpose and correct counsel or to caution or instruct the jury in the case of a violation of the privileges of argument, is error and reversible error as a rule, and usually where opposing counsel have objected, but it is not always reversible error,[19] the decisive consideration being whether or not there was resulting prejudicial error. To overrule a proper objection is error,[20] and in response to an objection it is not sufficient for the court to say "these arguments are not evidence" or words to that effect in order to remove prejudice.[21] Improper remarks for which there is no excuse should be rebuked with vigor.[22] If the trial court is unable to restrain counsel in his abuse of his privileges evidently the proper course is to grant a new trial.[23] While it is error for the trial judge to make remarks indicating his opinion on

[13] Brown v. Perez, 89 Tex. 286; Erb v. Ins. Co., 98 Iowa. 606; Lawlor v. Kemper, 20 Mont. 13.

[14] Bullard v. B. & M. R. Co., 64 N. H. 27, citing Burnham v. Butler, 58 N. H. 568; Cole v. Boardman, 63 N. H. 583.

[15] Brown v. Swineford, 44 Wis. 282; Houston, etc. R. Co. v. White (Tex.), 56 S. W. Rep. 204.

[16] Cutler v. Skeels, 69 Vt. 161; Magoon v. B. & M. R. Co., 67 Vt. 195, and cases cited.

[17] Yankton v. Douglass, 8 S. Dak. 440; Western, etc. R. R. Co. v. Ledbetter, 99 Ga. 318; Shaler v. Broadway Imp. Co., 47 N. Y. Supp. 815; Riley v. Ry. Co., 68 Mo. App. 652, citing Gidionsen v. R. R., 129 Mo. 403; Ford v. Cheever, 113 Mich. 440; Wenzel v. Johnston. 112 Mich. 243; Murphy v. Gillum, 79 Mo. App. 564; Tyler, etc. Works v. Ryco (Tex.), 55 S. W. Rep. 350; Baxter v. Detroit Ry., 116 Mich. 188; Ruth v. C., etc. Ry. Co., 70 Mo. App. 190; Felix v. Scharnweber, 119 Ill. 448; Phippen v. Bay Cities, etc. R. Co., 110 Mich. 353, citing Maclean v. Scripps, 52 Mich. 214; Warren v. Halley, 107 Mich. 120; People v. Wirth, 108 Mich. 307; Taylor v. Mallory, 96 Va. 18; Wheeler v. Jenison (Mich.), 79 N. W. Rep. 643; Billings v. Ins. Co., 70 Vt. 477; Abbott v. Mobile, 119 Ala. 595; Distilling Co v. Riggs (Ky.), 45 S. W. Rep. 99; Collins Park & B. R. Co. v. Ware, 110 Ga. 307, 37 S. E. Rep. 975.

[18] Chesebrough v. Conover, 140 N. Y. 388; Cole v. Fall Brook Coal Co., 159 N. Y. 59, citing Marks v. King, 64 N. Y. 628; Platner v. Platner, 78 N. Y. 90; Gall v. Gall, 114 N. Y. 121; Blashfield v. E. S. Tel., etc. Co., 147 N. Y. 527; Holmes v. Moffat, 120 N. Y. 159. In I. C. R. R. Co. v. Treat, 179 Ill. 576, a judgment for plaintiff was not reversed notwithstanding an improper offer by his attorney, the trial court properly instructing the jury, but Justices Boggs, Cartwright and Phillips filed a dissenting opinion and cited Scripp v. Reilly, 38 Mich. 10; State v. Moore, 104 N. Car. 744; Birmingham Nat. Bk. v. Bradley, 108 Ala. 205; Leach v. Detroit Elec. Ry. (Mich.), 84 N. W. Rep. 316.

[19] Williams v. R. Co., 126 N. Y. 96, citing Mitchum v. State, 11 Ga. 616; Tucker v. Henniker, 41 N. H. 317; Rolfe v. Rumford, 66 Me. 564; Alabama, etc. R. Co. v. Carroll, 28 C. C. A. 207; K. C., etc. R. Co. v. Sokal, 61 Ark. 130, citing L., etc. R. Co. v. Cavenesse, 48 Ark. 131; Brown v. Swineford, 44 Wis. 282; Holder v. State, 58 Ark. 473; Shular v. State, 105 Ind. 304; Waldron v. Waldron, 156 U. S. 361; Coble v. Coble, 79 Vt. 589, citing State v. Smith, 75 N. Car. 306; Devries v. Haywood, 63 N. Car. 53; Jenkins v. North Carolina Ore Co., 65 N. Car. 563; State v. Williams, 65 N. Car. 505; State v. Underwood, 77 N. Car. 502; Pringle v. Miller, 111 Mich. 663; Missouri, etc. R. Co. v. Woods (Tex. Civ. App.), 25 S. W. Rep. 741; Stone and Gravel Co. v. Gates Iron Works, 124 Ill. 623; Rotan v. Maedgen (Tex. Civ. App.), 59 S. W. Rep. 585.

[20] C., etc. Ry. Co. v. Newlin, 74 Ill. App. 648; Railroad Co. v. Stewart, 54 Ohio St. 667.

[21] Hundley v. Chadick, 109 Ala. 575, citing Florence C. & I. Co. v. Field, 104 Ala. 471; Bates v. Morris, 101 Ala. 282; Dollar v. State, 99 Ala. 236; Haynes v. McRea, 101 Ala. 319; Pollock v. Harmon, 94 Ala. 421; Schaidler v. Ry. Co., 102 Wis. 564, 78 N. W. Rep. 732.

[22] Masterson v. Ry. Co., 102 Wis. 571, 78 N. W. Rep. 757.

[23] Morrill v. Palmer, 68 Vt. 1.

facts necessary to be proved[24] still this will not always cause reversal.[25]

An attorney who errs in his theory of the case and believes that certain questions and evidence are proper when in fact they are improper, has a right to ask such questions, and where the court properly rules thereon the review court will not reverse.[26] The ruling of the trial court on the question of the propriety or impropriety of remarks must be made at the time. If the court directs counsel to wait until the summing up to make their objections the error is reversible,[27] and it is not proper to have it generally understood that all improper remarks are objected to.[28]

Prejudicial Error will Reverse.—Where prejudicial error results from improper remarks notwithstanding the objections interposed and the action of the court in restraining or attempting to restrain counsel and in directing and instructing the jury, courts of review will reverse the judgment.[29] The theory of this is that the error was so great that the prejudice it caused could not be removed by the court's admonitions. This of course usually occurs in cases of flagrant misconduct of counsel; and especially when the conduct is persistent and continuous, and when no rebuke or direction on the part of the court can destroy its influence,[30] as where witnesses are referred to as "ghouls" and "vultures" "prowling among the cots in the hospital"[31] and where the word "union" in a company's name was alleged to mean a monopoly.[32] When counsel neglects or refuses to withdraw the improper remarks, the verdict will be set aside.[33] In cases where there is evidence of error the judgment will at times be affirmed conditionally on *remittitur*.[34] If a case has been closely contested or there is a sharp conflict in evidence these and like considerations will favor a reversal,[35] and where there is a close issue, a judgment may be reversed even if the verdict is not excessive.[36] Courts of review have often and with emphasis announced that improper methods of trying causes will not be tolerated; that the only corrective is for counsel to know that by such methods they imperil whatever verdicts they may obtain, and if trial courts do not by way of rebuke, instruction or granting new trials do their duty as is their power, the appellate courts must apply the corrective.[37]

Allusion somewhat in detail to a few recent cases will show the general trend of judicial decisions. Where plaintiff's attorney said that if the defendant had an honest defense it would arbitrate, but that it was its policy to fight and the court merely told counsel to confine himself to argument, there

[24] I. C. R. R. Co. v. Souders, 178 Ill. 585, citing Andreas v. Ketchum, 77 Ill. 377; Skelly v. Boland, 78 Ill. 438; Feinberg v. People, 174 Ill. 609.

[25] L. E., etc. Ry. Co. v. Close, 5 Ind. App. 444.

[26] Young v. Fox, 49 N. Y. Supp. 634.

[27] Halpern v. Nassau Elec. R. Co., 45 N. Y. Supp. 134, citing Koelges v. Ins. Co., 57 N. Y. 638; Williams v. Railroad Co., 126 N. Y. 96.

[28] Penn. Co. v. Greso, 79 Ill. App. 127.

[29] St. L., etc. R. Co. v. Waren, 65 Ark. 619, citing K. C., etc. R. Co. v. Sokal, 61 Ark. 130; Hood v. C. & N. W. Ry. Co., 95 Iowa, 331, citing Henry v. Ry. Co., 66 Iowa, 56; Rudd v. Rounds, 64 Vt. 432; McHenry Coal Co. v. Sueddon, 89 Ky. 684; Wheeler & W. Mfg. Co. v. Sterrett, 94 Iowa, 160, citing Henry v. R. Co., 70 Iowa, 233; Whitset v. R. Co., 67 Iowa, 159; Jones v. Assn., 92 Iowa, 652; *In re* Barney's Will (Vt.), 44 Atl. Rep. 75; Potter v. Ry. Co. (Mich.), 82 N. W. Rep. 245; Britton v. R. Co., 118 Mich. 491, 76 N. W. Rep. 1043; Daggett v. Mfg. Co., 45 Atl. Rep. 755; Greenfield v. Kennett (N. H.), 45 Atl. Rep. 253.

[30] Lindsay v. Pettigrew, 10 S. Dak. 228, 3 S. Dak. 199; Bagully v. Morn. Journ. Assn., 56 N. Y. Supp. 605, citing Halpern v. R. Co., 45 N. Y. Supp. 134; C., B. & Q. v. Kellogg, 55 Neb. 748, 154 Neb. 127; Garrity v. Rankin (Tex.), 55 S. W. Rep. 367; Smith v. Jennings (Mich.), 80 N. W. Rep. 236.

[31] Rudiger v. C., etc. R. Co., 101 Wis. 292, citing Friemark v. Rosenkrans, 81 Wis. 359, and other cases.

[32] Union Compress Co. v. Wolf, 63 Ark. 174, citing L. R., etc. R. Co. v. Cavenesse, 48 Ark. 106, and authorities therein cited.

[33] Robertson v. Madison, 67 N. H. 205.

[34] Wetzel v. Meranger, 85 Ill. App. 457; C., B. & Q. v. Kellogg (Neb.), 76 N. W. Rep. 462, citing on the general subject Iron Co. v. Field (Ala.), 16 South. Rep. 538; Bullard v. R. Co., 64 N. H. 27; Paper Co. v. Banks, 15 Neb. 20; Live Stock Co. v. May, 51 Neb. 474; Martin v. State, 63 Miss. 505; Rudolph v. Landwerlen, 92 Ind. 34.

[35] The Oriental v. Barclay, 16 Tex. Civ. App. 193, citing Willis v. McNeil, 75 Tex. 465; Ry. v. Jarrell, 60 Tex. 268 and other cases; Killoven v. Meehan & Dunn, 68 Mo. App. 212. See also in this connection Giddionsen v. Ry., 129 Mo. 392; Hoffman v. Hoffman, 126 Mo. 416; Olfermann v. Union Depot Ry. Co., 125 Mo. 417; St. L., etc. R. Co. v. Holmes (Tex. Civ. App.), 49 S. W. Rep. 658, citing Tel. Co. v. Teague (Tex.), 27 S. W. Rep. 958; Dillingham v. Wood (Tex.), 27 S. W. Rep. 1074.

[36] St. L., etc. Ry. Co. v. McLendon (Tex. Civ. App.), 26 S. W. Rep. 307, citing among other cases, Sinclair v. Stanley, 69 Tex. 718; Ry. Co. v. Jones, 73 Tex. 235; Moss v. Sanger, 75 Tex. 323.

[37] P., etc. R. Co. v. Warren, 64 Ill. App. 584; W. C. St. R. R. v. Groshon, 51 Ill. App. 463; Same v. Annis, 62 Ill. App. 180, affirmed 165 Ill. 475; Same v. Krueger, 67 Ill. App. 574; Same v. McKeating, 68 Ill. App. 439; Waldron v. Waldron, 156 U. S. 361.

was held to be fatal error.[38] Remarks about an unequal contest between a poor woman and a rich corporation, and charges of drunkenness on the part of defendant's employees, of which there is no evidence, will render it impossible for the supreme court of Texas to reverse a finding of the court of appeals that there was prejudicial error.[39] An argument of plaintiff's attorney that defendant had been guilty of dangerous practices for a long time will cause a reversal, it not being based on evidence;[40] and so will a comment that a deposition had been taken but the court would not allow it to be read, and that counsel's client should not be made to suffer for the court's ignorance;[41] but remarks to the effect that a defending railroad is "an artificial being without life, without soul, as cold as iron, as heartless as marble," etc., will not cause a reversal where there is no showing that opposing counsel asked an instruction and the court refused the same.[42]

Improper Remarks not Causing Prejudice will not Reverse.—In contradistinction to the foregoing rule that where prejudicial error results, which is not removed, there will be a reversal, is the rule that appellate courts will not reverse a judgment on account of improper remarks of counsel unless it is plain that justice was subverted or defeated thereby; when no harm has been done there is no need of a new trial; a just verdict will stand.[43] While a verdict against the clear weight of the evidence will be reversed,[44] a finding of the jury according to the preponderance of the testimony will seldom be disturbed.[45] Even where there is error on the part of the court or the counsel, or both, such errors will be regarded as harmless unless it clearly appears that the objecting party was prejudiced thereby.[46] It will not be assumed that every misstatement of law or fact made by counsel in the course of a heated trial will have the effect of exciting improper prejudices, as the instructions of the court and the good sense of a competent jury will be regarded as sufficient protection against ordinary errors.[47] Illogical and absurd arguments will not justify reversals where it does not appear that the jury was misled or prejudiced.[48] It will be taken into consideration that opposing counsel have the right to reply when such is the fact.[49] Weight also will be given to the fact that the trial judge, the one whose opportunity was the best to determine all pertinent questions, has overruled a motion for a new trial before the appeal and any misconduct of counsel must appear to have been injurious to the objecting party before this action of the trial court will be reversed.[50]

Conclusion.—Fine distinctions and discriminations are connected with various phases of the general subject under discussion to such an extent that, as indicated above, few exact rules in relation thereto of sufficiently general application to be of value, can be framed. The course of the trial lawyer is however moderately clear from the import of the above judicial determinations. While he may differ with the court as to what remarks are proper, he need not necessarily on that account allow the record to contain reversible error if the point of difference is

[38] Ranchan v. Rutland R. Co., 71 Vt. 142, 43 Atl. Rep. 11.

[39] C., etc. R. Co. v. Langston, 92 Tex. 709.

[40] Heald v. C. & M. R Co. (N. H.), 44 Atl. Rep. 77.

[41] Cunningham v. Speagle (Ky.), 50 S. W. Rep. 244.

[42] Landers v. Ohio R. Co. (W. Va.), 33 S. E. Rep. 296.

[43] C. & A. R. R. Co. v. Dillon, 123 Ill. 578; Roose v. Roose, 145 Ind. 165; Buscher v. Scully, 107 Ind. 246 and cases cited; Horms v. Steir, 67 Ill. App. 634, citing W. C. St. R. R. Co. v. Annis, 62 Ill. App. 180; N.C. St. R. Co. v. Leonard, 67 Ill. App. 603, affirmed 167 Ill. 618; M., K. & T. Ry. Co. v. Withers, 16 Tex. Civ. App. 506; Tunnicliff v. Bay Cities Con. Ry. Co., 107 Mich. 261; Sabine v. Merrill, 67 N. H. 226; Texas Brewing Co. v. Walters (Tex. Civ. App.), 43 S. W. Rep. 548; Texas, etc. Ry. Co. v. Hughes (Tex. Civ. App.), 41 S. W. Rep. 821, citing Ry. Co. v. Duelin, 86 Tex. 450; Radford v. Lyon, 65 Tex. 471; Schular v. State, 105 Ind. 289; McDonald v. Ft. Dear. Nat. Bank, 72 Ill. App. 17 (reversed on other grounds); Barber v. Hutchins, 66 Tex. 323; Kohman v. Baldwin (Tex. Civ. App.), 46 S. W. Rep. 396; Chamberlain v. Ry. Co (Mich.), 81 N. W. Rep. 339; Shelby v. Detroit Ry. (Mich.), 81 N. W. Rep. 106; Taylor v. Ins. Co. (Iowa), 82 N. W. Rep. 326.

[44] Cleveland Paper Co. v. Banks, 15 Neb. 20.

[45] Howard v. Howard, 99 Ga. 298; Swift & Co. v. Rutkowski, 82 Ill. App. 108; Willis & Bro. v. Lowry, 66 Tex. 542.

[46] Boltz v. Sullivan, 101 Wis. 608; I. C. R. R. Co. v. Welland, 179 Ill. 609, affirming 67 Ill. App. 332; Smiley v. Scott, 179 Ill. 142, affirming 77 Ill. App. 555; Demars v. Mfg. Co., 67 N. H. 404; Furnald v. Burbank, 67 N. H. 595.

[47] Knopke v. Ins. Co., 99 Wis. 293, distinguishing Sutton v. R. Co., 98 Wis. 157; Henry v. R. Co., 121 Ill. 268; Perkins v. Roberge (N. H.), 39 Atl. Rep. 583.

[48] Hayes v. Smith, 15 Ohio C. C. 300.

[49] Galveston, etc. Ry. Co. v. Duelin, 86 Tex. 450; Furnish v. Burge (Tenn.), 54 S. W. Rep. 90.

[50] City of Lafayette v. Weaver, 92 Ind. 477.

not a vital one. If he contemplates knowingly to abuse his privileges of argument he had best not do it. It is difficult to see wherein he could thereby profit. A persistent course in this direction insures a new trial or a reversal, and a large verdict does not even aid a settlement when one or the other of these is certain. If counsel has inadvertently or in any way made improper remarks he should promptly withdraw them with or without objection by the other side and ask the court for a decided and certain instruction to the jury that will have the effect of removing any prejudice caused, and except in a case of flagrant and persistent impropriety, this will be sufficient.

As to the course of counsel who have the right of objection, the decisions are not so clearly of one import. The earlier decisions made it the duty of the court to correct offending counsel and to admonish the jury, a failure to act in this respect being regarded as a ruling that the remarks were proper to which implied ruling counsel could except. According to this line of decisions counsel who is defending, if no others, should ordinarily keep quiet and rejoice in his silence while his opponent piles error upon error in an argumentative structure. The later and better line of decisions is to the general effect that counsel who desires to object to his opponent's remarks must do so at the time they are made and with specification, as otherwise he is presumed to waive any objection, placing the burden upon him to watch his and his client's interests, not upon the trial judge. And this is eminently proper. It being the duty of counsel so desiring to object, it is his further duty to insist upon a decisive ruling to which there can be an exception, all of which becomes a part of the record, and in this way by a proper assignment of error is brought to the attention of the reviewing court.

CYRUS J. WOOD.

Chicago, Ill.

CRIMINAL EVIDENCE — CONFESSIONS— INDUCEMENTS AND PROMISES.

McVEIGH v. STATE.

Court of Criminal Appeals of Texas, May 1, 1901.

Where a friend of a person accused of burglary was used by the officers to get accused to make a confession, and stated that, if he would confess, they would get the district attorney to dismiss the case against him, and the sheriff said, though he would not promise that much, that he would use his influence to "make it go lighter with him," and the deputy sheriff said "it might make it go lighter with him," and that he "had known men to be turned loose by turning state's evidence," there were such inducements leading defendant to believe that his condition would be bettered by confessing that a confession made under such circumstances was not admissible in evidence.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary. The state introduced appellant's confessions against him. Appellant excepted on the ground that he was under arrest at the time the confessions were made, and was not properly warned, that the confessions were made to officers under promises of reward and persuasion. The state's witnesses (the sheriff and his deputy) testify that a proper warning was given, to-wit, that they told appellant before he confessed to the theft that same would be used against him as evidence. However, appellant introduced two witnesses who stated that the warning given was that his statement could be used for or against him. If this was the warning given, this confession was not admissible. Guinn v. State, 39 Tex. Cr. Rep. 257, 45 S. W. Rep. 694; Unsell v. State, 39 Tex. Cr. Rep. 330, 45 S. W. Rep. 1022. If this were the only question made as to the warning given, it being a matter of controversy as to the character of warning, one being legal and the other illegal, we would hold that a proper charge of the court, submitting this issue to the jury, was the correct practice. The charge, however, was defective in other respects, which we will point out hereafter. As stated before, it was also objected to the confession that, although the warning given may have been a legal one, yet it was made under such promises by the officers as to render it inadmissible. If there was any controversy between the witnesses as to what was said by the officers to the defendant, the court might, by a proper charge, have submitted this issue to the jury. But the officers themselves admit that they used some language of a persuasive character. Loessin shows that he knew Dr. Clark was a friend of defendant, and was using him to get a confession from him. Clark, it seems, told defendant, if he would make a confession and tell who was assisting him in taking the seed, they would get the district attorney to dismiss the case against him. The sheriff thereupon stated he would not go that far, but, if he would tell about it, it might go lighter with him. Deputy Sheriff Eilers says he told him he ought to tell it, and, if he did, it might go lighter with him, and he had known men to be turned loose by turning state's evidence. Clark says he told defendant, if he would confess, he would go on his bond, and they would get the district attorney to dismiss the case against him. The sheriff then said he

would not go that far, but would use his influence to make it lighter on him. It seems, Kesler, who was introduced by the state on this point, testified that Dr. Clark first stated what he had promised Martin; that is, that they would have the case dismissed against him. The sheriff said he could not promise him that, but he would use his influence to make it lighter on him; and after this Martin made the statement, which was that he and three other parties stole the cotton seed. The language here sought to be used to induce the confession is certainly as strong as the language used in Searcy's Case, 28 Tex. App. 513, 13 S. W. Rep. 782. In Thomas v. State, 35 Tex. Cr. Rep. 178, 32 S. W. Rep. 771, we laid down the principle governing the admissibility of confessions. We quote from that opinion, as follows: "The real question being, in every case, whether or not the confessing mind was influenced in a way to create doubt of the truth of the confession, an involuntary confession, uttered to bring temporal good or avert temporal evil, even when the contemplated benefit is small, will be rejected. The circumstances under which the confession was made are of very great importance. They must be looked to in all cases, and when this is done, and there is nothing pointing to the motive prompting the confession, it will be received. Now, whether there is an express or implied promise to aid the suspected person, or a threat of temporal injury, or whether the suspected person is told that it would be better for him to confess, etc., does not always solve the question. It is true that the inducement under which the confession was uttered is of prime importance, but not always decisive. The inducement and the surrounding circumstances decide the question. The inducement may not be sufficient to show the motive for the confession, but, when read in the light of the surrounding circumstances attending it, it may be ample proof to create doubt of the truth of the confession." Now, when we read the testimony of the state's witnesses in connection with the surrounding circumstances as testified to by them and other witnesses, we are constrained to the opinion that appellant was induced to confess by the promise made to him by the sheriff. It will be observed in this connection that before he made the statement to the sheriff he had already, under the promise made by Dr. Clark, whom the sheriff was using, made the confession to him. No doubt, he believed Clark was acting for the sheriff, and having already secured a confession through Clark by a larger promise, and though this was in part repudiated by the sheriff, yet, evidently, the previous confession was a part of the transaction, and was induced by promises of getting him released from prosecution. Under the circumstances we believe that the confession should have been rejected.

On this subject of confessions, we notice the court gave the following charge: "You will determine from the evidence whether there was or was not a confession under such a warning, as before defined, and voluntarily and freely made, as before instructed. If you so find, you will convict defendant, and assess his punishment by confinement in the penitentiary not less than two, nor more than twelve years." This was evidently a charge on the weight of the testmony; that is, the effect was to tell the jury to convict appellant on his conviction alone. This confession went to the jury as any other testimony, but the court had no right to instruct the jury to convict defendant on his confession; it not being a judicial confession. It is not necessary to discuss other questions, but, for the errors pointed out, the judgment is reversed and the cause remanded.

NOTE.—*Admission of the Confessions as Evidence in Crimtnal Prosecutions.*—It is a well known rule of law that confessions cannot be received as evidence unless made voluntarily; that is, made without any suggestion of hope or fear by any other person. Brisler v. State, 26 Ala. 107; Young v. State, 50 Ark. 501; Miller v. State, 25 Wis. 384; Roberts v. State, 75 Ga. 8 3; Speer v. State, 4 Tex. App. 474; People v. Taylor, 93 Mich. 638; State v. Suggs, 89 N. C. 527; State v. Hopkirk, 84 N. J. Law, 163. But of course confessions are not to be excluded because not spontaneous, it being only where they have been extorted or dragged reluctantly from the accused through the deliberate excitation of his hopes or fears by some actual promise or threat, that the court should refuse to permit them to go to the jury. For instance, a confession of a prisoner is admissible in evidence where it appears that it was made of his own motion to the witness while visiting him in jail at his request, and that the witness knew of no promises or threats made to him. Mose v. State, 36 Ala. 211. A confession is admissible unless there was a substantial promise of favor made or sanctioned by a person in authority, or some other inducements calculated to make the confession an untrue one. State v. Staley, 14 Minn. 105. A confession made by a defendant on the day of the homicide, before his arrest, without inducements or threats, was admissible. Basye v. State, 45 Neb. 261. But where it appeared that it was doubtful whether or not inducements by the police had not been offered to accused to make a written declaration, purporting to be a voluntary confession, its admission was error, since, under such circumstances accused was entitled to the benefit of the doubt. State v. Garvey, 25 La. Ann. 191. In order to exclude a confession, the influence of hope or fear must be so great that, in the judgment of the court, a confession induced thereby would be unworthy of credit. State v. Patrick, 48 N. Car. 443. Of course declarations made by defendant before any suggestion had been made to arrest him, are admissible. McKenzie v. State (Tex. Crim. App. 1895), 543. Defendant's confessions as to his marriage, in a prosecution for seduction, are admissible when seriously and solemnly made; but the mere acknowledgment of the relation of husband and wife, made idly or to ward off prosecution, or to stifle inquiry, is inadmissible. West v. State, 1 Wis. 259. As a general rule, it may be said the motives with which a voluntary confession is made are, as a general rule, immaterial upon the question of its admissibility. For instance, a voluntary confession of murder is not inadmissible because made to free defendant's sister,

then under arrest for the crime, from suspicion, especially where defendant testifies in self-defense to every fact contained in the confession, and the sister testifies that he acknowledged to her substantially the same facts immediately after the killing. People v. Smalling, 94 Cal. 112; also State v. Staley, 14 Minn. 105. But see *contra*, Austine v. People, 51 Ill. 236, where it was held that a confession made with a view of compromising the matter with the injured party, is inadmissible. It was held in the case of Woolfolk v. State, 85 Ga. 69, that it was not against public policy to receive in evidence a confession contained in a prayer of the accused overheard while he was alone in his cell.

To render a confession incompetent on the ground that it was induced by the promise of some benefit to accused, the promise must have been made or sanctioned by some person in authority. A confession is never admissible when made under a threat or promise by a person having authority over the prosecution, or in his presence, or by his sanction. Rice v. State, 22 Tex. App. 654; United States v. Stone (C. C.), 8 Fed. Rep. 232. However, a confession made to the prosecuting attorney, voluntarily and without solicitation or promise, is admissible, it not appearing that accused was not fully informed as to the duty of the prosecuting attorney. Walker v. State, 136 Ind. 663. The fact that a confession was made to a justice before whom the preliminary information was filed, does not render it inadmissible. State v. McLaughlin, 44 Iowa, 82. Admissions of accused are not inadmissible merely because made to the officer who arrested him. State v. McLaughlin, *supra*. In a criminal case, the voluntary confessions of one of the defendants were admissible in evidence, though made to witnesses, who happened to be a constable and justice of the peace. State v. Monie, 26 La. Ann. 513. The statements of a prisoner to the prosecuting attorney are competent against him, if he was duly cautioned, and they were not forced from him. People v. Howes, 81 Mich. 396. A confession is not rendered inadmissible by the fact that it was prompted by mere suggestions or advice, or even solemn adjurations, by one holding no official position. State v. Fredericks, 85 Mo. 145. A confession obtained by the promise of a private detective, employed to work up the case, that the Commonwealth would make it easier for the prisoner if he would tell all about the crime, was not "induced by one in authority," and was admissible. Early v. Commonwealth, 86 Va. 921.

After the fact is known that either the influence of hope or fear existed, inducing a confession, explicit warning must be given the prisoner of the consequences of a confession, and it must also be clear that he understood such warning before his confessions are admissible in evidence. Van Buren v. State, 24 Miss. 512; Walker v. State, 28 Tex. App. 112; Rodriguez v. State (Tex. Cr. App. 1896), 36 S. W. Rep. 439. Voluntary admissions, of course, are admissible, though defendant was not warned that he need not criminate himself unless made to an officer having him in custody. Dick v. State, 30 Miss. 593; State v. Workman, 15 S. Car. 540. Proof of a statement by a defendant to the officer arresting him for an assault, that he was in the town where the assault was charged to have been committed, on the day before and day after the date laid in the indictment, is admissible, regardless of whether or not defendant was previously cautioned by the officer. Commonwealth v. Robinson, 165 Mass. 426. The reason for that decision is that the fact confessed was collateral to the fact charged in the indictment. A confession made by defendant after he was told that whatever statements he made would be used as evidence against him, is admissible in evidence against him. Calloway v. State, 103 Ala. 27. In the case of Rizzolo v. Commonwealth, 126 Pa. St. 54, the officer who arrested the defendant said to him: "If you have anything to tell me, tell me the truth; if not, tell me nothing. You have a right to keep your mouth shut, but I tell you now, anything you say to me I shall use against you." Held, that evidence of a confession made to such officer by the defendant, was admissible. Where the sheriff was sent for by a prisoner in his jail to receive a confession which the prisoner was urged to make by a third person, and the sheriff warned the prisoner that his confession must be voluntary, and that he need not expect any favors from him, such confession cannot be objected to as incompetent. The warning given excludes the idea of the sheriff having sanctioned any inducement offered by the third person. Jones v. State, 58 Miss. 349. A statement by an officer who arrested defendant for forgery, made to him: "I have known you a long time, and will help you all I can, and if you say you did not forge that paper, I'll see M, and get him to compromise it with you. If you did do it, it might be best for you to say so; but if you did not, stick to it that you did not," is not sufficient to render a confession made by defendant to the officer inadmissible. Dotson v. State, 88 Ala. 208. A confession made by a prisoner upon the magistrate saying that it "would be better for him to tell the truth, and have no more trouble about it," is inadmissible. Biscoe v. State, 67 Md. 6.

JETSAM AND FLOTSAM.

CORPORATION LAW OF SOUTH DAKOTA.

The laws of South Dakota are more liberal to corporations than those of any other State in the Union. This fact and the very low cost of forming corporate companies, is causing many hundreds of business corporations to organize in South Dakota. The following table shows the comparative cost of incorporating a company with a capitalization of $1,000,000, in different States.

INCORPORATING FEE.	
Pennsylvania,	$3,333.33
New York,	1,250.00
New Jersey,	200.00
Delaware,	150.00
South Dakota,	10.00
ANNUAL FRANCHISE TAX.	
Pennsylvania,	$5,000.00
New York, minium rate,	1,250.00
New Jersey,	1,000.00
Delaware,	500.00
South Dakota,	Nothing.

There is no capitalization or annual tax.

Meetings may be held outside the State. Full paid stock may be issued for cash, property or services. No personal liability, beyond amount of unpaid subscription for stock. Costs no more to incorporate with one billion dollars' capital than one thousand dollars' capital.

The South Dakota Corporation Charter Company, P. O. Box 316, Pierre, South Dakota, whose advertisement appears in this issue, is a thoroughly reliable corporation, organized to procure charters for companies desiring to incorporate in that State. The

president and counsel of the company is Mr. Ivan W. Goodner, a very careful lawyer, a member of the bar of the United States Supreme Court, and a gentleman widely known throughout the state. For a very low fee the company will furnish resident incorporators, see that articles are in proper form and filed and charter issued. Vast numbers of companies are forming under the South Dakota laws, as their unusually liberal character is becoming more generally known. These corporations are to transact all sorts of business, manufacturing, commercial, gold, silver, copper, iron and zinc mining, and oil companies by the hundred.—*National Corporation Reporter.*

UNIFORMITY IN THE LAW OF COMMERCIAL PAPER.

Another important state has been added to the list of those which have adopted a uniform law of commercial paper. This is Pennsylvania, whose legislature has recently passed the Negotiable Instruments Act. More than a third of the states of the Union have now declared in favor of uniformity in this important branch of the law, and these comprise some of the most important commonwealths in the sisterhoods. When regard is had to the circumstances, the progress thus far attained must be regarded as encouraging, for it is, unfortunately, true, that the path of reform is not usually an easy one, or one traversed with rapidity. The reformer has to contend not alone with active opposition, which, while often difficult to surmount, yet has the salutary effect of stimulating effort, but he has to overcome the deadening influence of inertia, which is often more difficult to combat effectively.

As an illustration of how much may be accomplished by persevering effort in a not very long space of time, it may be worth while to glance at the history of the movement, another step in which we have just recorded. Not quite twenty years ago a codification of the law of bills and notes was enacted in Great Britain. This was, to be precise, in 1882. This measure furnished the basis of the legislation which has now been enacted in so many of the states. As the result of conferences between committees of the American Bar Association and of the Commissioners on Uniformity of Legislation appointed in many of the states, a revision of the British law adapted to American conditions was prepared by Mr. John J. Crawford of the New York city bar. The draft prepared by him was sent to the State Commissioners on Uniform Laws and to many of the authors and experts on that subject inviting criticisms and suggestions, and, after considering such recommendations as were received, the Negotiable Instruments Law was finally evolved and recommended for adoption in the several states.

The task of securing the enactment of the law has not been so easy as the task of framing it, though that was not free from difficulty. In the first year in which it was urged upon the attention of the state legislature (1897), it was adopted by four of them, namely, those of New York, Connecticut, Colorado and Florida. This was not a large number, it is true, but a great gain was made in securing the enactment of the law in what is commercially the most important state in the Union, namely, New York. Four states passed the law in the following year (1898), namely, Massachusetts, Maryland, Virginia and North Carolina. A further advance was scored in 1899, when the law was passed in the District of Columbia and the states of Wisconsin, Tennessee, Oregon, Washington, Utah, Rhode Island and North Dakota. Thus the record stood at the date of the convention of the American Bankers' Association at Richmond in October of last year, as appears from the report of the committee of that body on uniform laws.

Taken as a whole, the progress made may be said to be encouraging. In some of the states, as experience has shown, an uphill fight may yet have to be made, but in others it has failed by only a narrow margin. In California it passed both houses of the legislature, but failed to secure the governor's approval because of some friction which arose between the governor and the legislature. In Illinois it had the influence of the governor and went through the senate and failed in the house. In Indiana a similar result was reached. In Michigan the bill passed the house but failed in the senate. In South Dakota the bill passed the senate and was pending in the house when the legislature adjourned. Of the states which have enacted the law, some, such as New York, Massachusetts and Pennsylvania, are of the first importance from a commercial point of view, and their example may well be counted upon to influence the action of others. The momentum in favor of the law has also been increased by the adhesion of so many widely separated commonwealths, some of which are at one extremity of the United States on the Atlantic Ocean, while others are on the Pacific with the width of a continent between. The history of the movement, even up to the present, has been of a nature to encourage reformers who, as a rule, have to rejoice more at the prospects of hope than at the results of realization.—*Bradstreet's Journal.*

BOOK REVIEWS.

INDEX DIGEST NEW YORK APPEALS REPORTS.

One of the signs of the times is apparent in the new Index Digest to the New York Court of Appeals Reports, just compiled by Colin P. Campbell. It is a digest of a digest. The customary way of editing a digest is simply to gather together the syllabi of the cases and classify them under proper headings. This is called the long digest method and is both cumbersome and faulty. The overburdened reporter in making up a syllabus to a case often mistakes the pivotal point upon which the decision rests, or if he does recognize it, often clothes his thought in such obscure language as to convey no impression on the real meaning which he intended to convey. The short digest method is splendidly exemplified in the book under review. It is a complete digest of the law of New York in one volume. It gives in the shortest form of each opinion, the pith of each opinion, substance of the case without unnecessary multiplication of words. It pays no attention to the syllabus of a case but the case is considered carefully and the particular point decided is given briefly, with great accuracy and clearness, affording instant reference to the immense amount of invaluable matter contained in these reports. For instance, under the head of libel and slander, we note subdivision II. Actionable Words, and under that, the following pithy digests: "Effect of words accusing highway commissioners of larceny, Hayes v. Ball, 72 App. 418. Imputing want of professional capacity to attorney, libelous *per se*, 147 App. 624. To charge one with being a concert hall singer on Coney Island, libelous *per se*, 155 App. 228, etc. This method we consider the highest attainment in digesting and one which inevitable necessity will compel to be universally adopted. In

regard to Mr. Campbell's work we have only this to say that any one having access to the New York Court of Appeals Reports should not attempt to use them without this valuable aid, and those not having a set will find it of incalculable value in determining whether they will find a decision in support of their point from a court which is recognized as authority by every tribunal in our country. Published in one large royal octavo volume of 1500 pages by Matthew Bender, Albany, N. Y.

BOOKS RECEIVED.

An Index Digest of New York Court of Appeals Decisions, 1847-1901. By Colin P. Campbell, LL.M., Counselor at Law. Albany, N. Y. Matthew Bender, 1901. Sheep, pp. 1,500. Price, $8.50.

HUMORS OF THE LAW.

An Arkansas lawyer writes that some years ago a lawyer living in Illinois thought he might venture to open an office in Arkansas, but first wrote to an acquaintance there, telling of his plan, but saying that he was a Republican and wished to know if his life would be safe, and also if there was an opening there for an honest lawyer. His Arkansas correspondent replied that he could come with perfect impunity, as the game laws would protect his life, and that as an honest lawyer he would be absolutely without competition in the state.

On a Western Circuit, where the Judge and the State's Attorney traveled, they were holding court in a town where a wave of virtue had attacked the gambling houses. A colored helper in one of these houses was being examined as a witness against his employer. The State's Attorney questioned him closely as to the location and number of the gaming tables, with the following result: Answer. "There was just two tables, boss." Question. "No more than two?" Answer. "No, sah, 'cept in cote time. Then a table's put in the private room where you all was playing last night,"—giving a significant sweep of his hand that included both State's Attorney and Judge.

WEEKLY DIGEST.

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMIRALTY—Collision — Recovery of Damages — Right to Enforce Contribution.—The rule of the common law that no contribution can be enforced between tort feasors is not the rule in admiralty as between two vessels each of which was in fault for a collision by which a third party sustains damage, but, on the contrary, the right of each to require the other to bear an equitable proportion of the loss has always been enforced as a substantial legal right, and it was in recognition of such right that admiralty rule 59 was promulgated, giving the owner of a vessel proceeded against the right to implead any other vessel contributing to the same collision, to enable the court to enter such decree "as to law and justice shall appertain." But, where the other vessel cannot be brought in because not within the jurisdiction, such accidental fact cannot change the legal right of the libeled vessel, and, where she is compelled to pay the entire damage, she is subrogated to the rights of the original damage claimant, and may bring an independent suit against the other to establish the latter's liability also, and enforce contribution.—THE MARISKA, U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 990.

2. ADMIRALTY — Injury to Vessel at Wharf—Storm.—A steamer came up to her usual berth at a dock during a gale and storm, and, owing to the failure of the wharfinger to make fast her stern line in time to prevent it, she was swung around by the wind, striking and injuring a wharf boat which was moored in the same slip, and crushing an electric launch which was tied up to such boat. It appeared that the line was thrown promptly and the wharfinger acted with reasonable promptness, and that the engines were promptly reversed, but there was not time to make sternway before the ship swung so far that she could not go astern without striking the opposite wharf. Held that, even with the presumption against her as the moving vessel, it could not be found, on such facts, that there was any want of ordinary care or skill on the part of her officers or crew which rendered her liable for the collision, but that the real cause of the accident was the violence of the storm.—THE CITY OF ABERDEEN, U. S. D. C., D. (Wash.), 107 Fed. Rep. 996.

3. ADMIRALTY — Maritime Liens — Wharfage—Contract with Charterer.—The fundamental requisite for the creation of a maritime lien is a maritime claim contracted or incurred on the credit of the vessel, either expressly or by implication, and not on the credit of the owner or other person in interest. No implied agreement arises for a pledge of the credit of a vessel for the rental of wharfage privileges in the port where the charterer, with whom the contract is made, resides where he is not the master, and is required by the charter to pay all expenses and keep the vessel free from liens, and where the owner of the wharf, if he is not informed of the fact or terms of the charter, is put upon inquiry by the circumstances, but makes no inquiry.—THE C. W. MOORE, U. S. D. C., E. D. (Wis.), 107 Fed. Rep. 257.

4. AGENCY—Liability of Agent when Acting as Depository.—Plaintiff deposited $50.00 with defendant under a contract for the purchase of certain real estate from defendant's principal, one of the terms of the contract being that said principal should furnish an abstract of title, and if, upon examination the title should prove defective, said sum so deposited with defendant should be returned to plaintiff. Held, that on the condition arising defendant became personally liable to plaintiff for the $50.00, even though in the meantime he had paid same to his principal.—KRULL v. LEA, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

5. AGENCY—Real Estate Agent—Commission on Sale.—The doctrine is settled in Missouri that a real estate agent for the sale of land is entitled to his commission when he has produced a purchaser who is willing, able and ready to take the same at the price asked by his principal, though the latter refuse to consummate the bargain.—FINCH v. GUARDIAN TRUST CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

6. AGENCY — Revocation — Compensation.—A mere agency not coupled with an interest is revocable at

the pleasure of the principal, but if the agent incurs expenses and expends time and labor in good faith, the principal will not be permitted to terminate the agency and appropriate the results of the agent's services without compensating him therefor.—ROYAL REMEDY & EXTRACT CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

7. ATTORNEY AND CLIENT—Value of Legal Services—Evidence.—The master is not bound by the opinion of other lawyers as to the value of an attorney's services for which claim is made.—TAINTOR v. FRANKLIN NAT. BANK OF NEW YORK, U. S. C. C., S. D. (N. Y.), 107 Fed. Rep. 825.

8. BANKRUPTCY — Abatement of Proceedings—Death of Bankrupt after Petition Filed.—Under the provisions of Bankr. Act 1898, § 1, cls. 4, 10, that "bankrupt" shall include a person against whom an involuntary petition has been filed, and "commencement of proceedings," with reference to time, shall mean the date when the petition was filed, in connection with section 8, which provides that "the death or insanity of a bankrupt shall not abate the proceedings," the death of a person against whom an involuntary petition has been filed after the service of subpœna, but before the return day, does not require or authorize a dismissal of the petition.—IN RE HICKS, U. S. D. C., D. (Vt.), 107 Fed. Rep. 909.

9. BANKRUPTCY—Claims Provable—Liability as Indorser of Commercial Paper.—The liability of a bankrupt indorser of commercial paper, which did not become absolute till after the filing of the petition, is a debt, within Bankr. Act 1898, § 63, subd. 4, which enumerates debts on contracts, express or implied, among those provable in bankruptcy; and it may be proved against his estate after such liability has become fixed, and within the time limited for proving claims.—MOCH v. MARKET ST. NAT. BANK, U. S. C. C. of App., Third Circuit, 107 Fed. Rep. 897.

10. BANKRUPTCY — Exemption of Bankrupt from Arrest—Injunction.—The determination by a state court in an action against a bankrupt that the debt sued on was created by the fraud of the defendant while acting in a fiduciary capacity, and the awarding of an execution against his body under the state statute, are not conclusive upon the court of bankruptcy on a petition for an injunction to restrain the enforcement of such execution that the debt is one from which the bankrupt will not be released by a discharge under Bankr. Act 1898, § 17, but that question is to be determined by the court of bankruptcy for itself under the federal laws and decisions.—KNOTT v. PUTNAM, U. S. D. C., D. (Vt.), 107 Fed. Rep. 907.

11. BANKRUPTCY—Receiver—Power to Maintain Suit.—The receiver authorized to be appointed by a court of bankruptcy by Bankr. Act 1898, § 2, cl. 3, "in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified," is limited in his powers to the evident purpose for which the statute authorizes his appointment, which is to take charge of the visible property of the bankrupt and preserve it as custodian until the appointment of a trustee. He cannot exercise the powers of a trustee for the creditors, and has no authority to maintain a suit to set aside a preferential payment made by the bankrupt to a creditor, which is conferred only by the act itself, in section 70, subd. "e," and specifically upon the trustee.—BOONVILLE NAT. BANK OF BOONVILLE, IND., v. BLAKEY, U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 891.

12. BANKRUPTCY—Summary Proceedings Against Assignee.—A court of bankruptcy has no jurisdiction to bring before it, by an order to show cause, a general assignee of a bankrupt, who has been ousted from his trust by the bankruptcy proceedings and by a summary order, and, under penalty of being adjudged guilty of contempt if he refuses, require him to pay over to the trustee money of the bankrupt's estate which he disbursed as such assignee prior to the bankruptcy proceedings, or which he retained for his compensation, subject to approval of the state court. Such a proceeding is not due process of law, and the fact that the assignee appears and contests the rule before the referee is not a waiver of his right to object to the jurisdiction. The provision of Bankr. Act 1898, § 23b, conferring jurisdiction of proceedings by a trustee "by consent of the proposed defendant," refers to consent to the tribunal in which the controversy is to be carried on, and not to the mode of procedure; and, where that is unlawful, the appearance of the defendant proceeded against, and his contesting the proceedings, do not confer jurisdiction.—SIMSHEIMER v. SIMONSON, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 899.

13. BENEFICIAL ASSOCIATIONS — Change of Beneficiary.—Where a benevolent association such as this adopts a particular method of changing the beneficiary in a benefit certificate, that method becomes exclusive, and the change can be made in no other manner.—GRAND LODGE A. O. U. W. v. ROSS, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

14. BENEFICIAL ASSOCIATIONS — Special Meetings—Notice.—Where the charter provides that regular meetings shall be held on the first Monday of each month, and that special meetings may be called by the chancellor after notice "stating the time, place, object and purpose" of the meeting, a meeting upon a day other than the first Monday of a month is not valid unless the proceedings show that it was authorized as aforesaid.—BOZARTH v. LINCOLN LEGION OF HONOR, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

15. BILLS AND NOTES—Effect of Release of One of Several Joint Indorsers.—Section 889, Rev. St., makes joint and several all contracts which by the common law were joint only. But said section does not apply to the assignment of a promissory note, because the common law did not permit such assignment. Therefore the release of one of several joint debtors at common law released them all. There being no statute upon the subject the common law rule applies to a case where several joint payees assign and indorse a promissory note, and one of them is released by the failure of the indorsee to make proper protest, and therefore, all of said indorsees are released.—NORTHRUP v. CHAMBERS, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

16. CARRIERS OF GOODS—Liability for Negligence of Connecting Carrier.—If a carrier receive goods for shipment beyond its line it is liable to the end of the route unless it specially contracts to carry only to the end of its own line. Thus where a carrier receives live stock for shipment beyond its own line without such special contract, and takes the shipper aboard as a passenger in charge of the live stock, there arises an implied contract to safely carry him the entire route and deliver him at its end.—JONES v. ST. L. & SAN FRANCISCO RY., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

17. CARRIERS OF LIVE STOCK—Failure to Unload Train—Action for Penalties.—By Rev. St. U. S. §§ 4386-4890, no common carrier of live stock conveying it from one state to another shall confine the same in cars longer than 28 consecutive hours without unloading for rest, water, etc., and a penalty of from $100 to $500 for violating the statute is made recoverable in the name of the government by a civil action. Held, that a carrier's confinement of a train load of cattle for a longer period than 28 hours without unloading was a single offense, within the meaning of such statute; and hence, in an action therefor, separate counts in the complaint or declaration for each car, intended to multiply the penalty by the number of cars, was not permissible.—UNITED STATES v. ST. LOUIS & S. F. R. CO., U. S. C. C., S. D. (Mo.), 107 Fed. Rep. 870.

18. CHATTEL MORTGAGE — Description of Property—Location.—Location of personal property mortgaged is a part of its description, and where the description otherwise is general, and the property is recited in the mortgage to be in B county when it was in fact at the time in S county, the mortgage is void as against innocent purchasers without notice.—JONES BROS. COM. CO. v. LONG, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

19. CONSPIRACY—Felony in Connection Therewith—Distinct Offenses.—Rev. Stat. U. S. §§ 5508, 5509, defining the offense of conspiracy to injure or intimidate citizens in the exercise of civil rights, and subjecting an offender, who has been guilty of a felony in connection therewith, to the punishment prescribed therefor by the state law, does not contemplate two distinct offenses against the United States; the conspiracy only being of federal cognizance, and made punishable, and the other crime being merely an aggravation thereof so that if the conspiracy is not proved there can be no conviction for the felony.—DAVIS v. UNITED STATES, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 753.

20. CONSTITUTIONAL LAW—Right of Suffrage—Prevention on any Account.—Const. Amend. 15, declares that the right of United States citizens to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude, and that congress shall have power to enforce this article by appropriate legislation. Rev. Stat. § 5507, based on such amendment alone, provides that every person who prevents, hinders, controls or intimidates another from exercising, or in exercising the right of suffrage guaranteed by the fifteenth amendment to the United States constitution, by means of bribing, etc., shall be punished. Held, that such statute was unauthorized by such amendment, since the latter does not grant congress the power to make criminal the deprivation of a citizen's right to vote, except in the instance of a discrimination on account of race, color, or previous condition of servitude, and the statute makes it an offense to deprive a man of his right to vote on any account whatever; hence an indictment in the words of the statute is demurrable.—UNITED STATES v. MILLER, U. S. D. C., D. (Ind.), 107 Fed. Rep. 913.

21. CONTEMPT — Imprisonment for Contempt of Injunction—Proper Remedy for Discharge.—*Habeas corpus* is a proper remedy to secure a discharge from imprisonment for contempt in violating an injunction sought on the ground that the prisoner, not being a party to the cause, was not subject to the jurisdiction of the court in the particular case, and hence it had no authority to punish for the offense as charged against him.—IN RE REESE, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 942.

22. CONTRACT—Bridge Company—Defense.—In a suit on the contract for deficiencies in tolls, defendants claimed a release from liability by reason of complainants' reductions in the stipulated rates. On this question individual officers of defendants testified that they each had no information of the reduction, but the proof showed, on the other hand, that during the long period in question these reductions had been submitted to agents and experts of defendants for examination, and that they were not only reasonable, but necessary to prevent diversion of traffic and income. Held, in view of the well-known course of business, and the certainty that changes of rates over one line or system of railroads would soon be felt or known on other lines, and especially in view of the direct interest of defendants in the rates charged, that they must have known thereof, and that their failure to object before suit imported consent, and hence the reductions were no defense.—PITTSBURGH, C., C. & ST. L. RY. CO. v. KEOKUK & H. BRIDGE CO., U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 781.

23. CONTRACTS—Mother and Daughter—Services.—If a daughter give personal attendance upon her mother for ten years, the services are valuable, and whether there be or not an agreement on the mother's part to pay for the same, they are sufficient to support a promissory note executed by the mother therefor.—WOODS v. FLANERY, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

24. CORPORATE DEBTS—Liability of Stockholders—Action to Enforce—Evidence—Question for Jury.—In an action against the record holder of stock to enforce, under the Maine statute, the liability to corporate creditors for the amount unpaid thereon, it appeared that defendant gave a receipt for the stock in question, and thereafter signed a proxy, reciting that he was a stockholder. Held sufficient evidence to entitle plaintiff to go to the jury, under proper instructions, on the question whether defendant dealt with the corporation, and obtained and held the stock, so as to make him liable as a stockholder, within the meaning of the statute, notwithstanding the real or equitable owner of the stock was liable.—DUNN v. HOWE, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 849.

25. CORPORATIONS — Foreign — Place of Business — Effect as to Payment.—A loan by a Tennessee building and loan association, through a traveling soliciting agent, to a resident of Alabama, where all the business in connection therewith was transacted, with the single exception of the association's assent thereto, made when the association had no place of business and authorized local agent in the state, is a violation of Const. Alabama, art. 14, § 4, and Code 1896, §§ 1316, 1318, 1319, enacted pursuant thereto, prohibiting foreign corporations from doing "any business" in the state without at least one known place of business and an authorized agent therein, and hence repayment of the loan cannot be enforced. — DENSON v. CHATTANOOGA NAT. BUILDING & LOAN ASSN., U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 777.

26. CORPORATIONS — Receivers — Mortgage to President.—Where the president of a going corporation loaned its money, taking demand notes therefor, and, wishing to realize, requested security, whereupon the corporation executed a mortgage, and it appeared that the corporation had been and was doing a good business, had assets exceeding its liabilities by $6,000, and had every reason to expect that its business would continue prosperous, such facts were sufficient to justify a finding that the mortgage was made in good faith, with no intention to hinder, delay, or defraud creditors, and a consequent holding that the receiver of the corporation was not entitled to have the mortgage declared fraudulent, and an assignee thereof restrained from foreclosing.—STEOHL v. SEATTLE NAT. BANK, Wash., 64 Pac. Rep. 916.

27. DEEDS—Covenants—Suit to Enjoin Breach—Parties Entitled to Maintain.—Complainants alleged that they conveyed certain land to defendant corporation upon a covenant that it should be used exclusively as a campus for a university, being induced thereto by representations made by defendant's representatives as to the great benefit which would accrue from the location and maintenance of the university there to the owners of property in the vicinity. They further alleged that defendant or its lessee was proceeding to erect derricks and other structures on the land for the purpose of drilling for oil thereon, and converting it into an oil field, in violation of such covenant, and thereby preventing its use as a campus, and they prayed for an injunction restraining defendant from making such use of the land. Held, that in the absence of any allegation that complainants were, at the time of filing their bill, the owners of any property in the vicinity which could be injuriously affected, it did not appear that they retained any interest in the covenant which entitled them to maintain suit.—LOS ANGELES UNIVERSITY v. SWARTH, U. S. C. C. of App., Ninth Circuit, 107 Fed. Rep. 798.

28. DEEDS—Effect of Conditions.—The consequence of the nonfulfillment of a condition on which real estate is conveyed is a forfeiture of the estate; hence, where the deed provides that there shall be no reversion after a certain time for the failure to perform any conditions therein imposed, after the expiration of such time the estate is freed from such conditions, and the grant becomes absolute.—LOS ANGELES UNIVERSITY v. SWARTH, U. S. C. C. of App., Ninth Circuit, 107 Fed. Rep. 798.

29. DEEDS—Estate Created—Defeasible Fee.—A deed conveyed real estate for the sole use of M "and her heirs, and, in default of issue on the death of said M," then to others. Held, that under the law of Georgia, where the property was situate, such deed did not create an estate tail, nor a life estate in M with remainder over, but a fee-simple estate in M, determinable upon the contingency of her death leaving no living issue; and that since, under the laws of the state at the time the deed was executed therein, a fee could not be limited on a fee, the conditional limitation over was void, and M was vested with the estate in fee simple absolute.—PRINTUP v. HILL, U. S. C. C., N. D. (Ga.), 107 Fed. Rep. 789.

30. EXECUTION — Motion to Quash Levy on Wife's Land.—A levy was made on certain real estate under an execution issued on a judgment against defendant. He filed a motion to quash the levy on the ground that title to the land was in his wife and not in him. Held, that the motion was properly overruled. Plaintiff in the execution had the legal right to cause the sale of the husband's interest, whatever it might be in the land, and the purchaser thereof would have had the right to have gone into a court of equity for the purpose of establishing the same.—RYAN v. BRADBERRY, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

31. FIXTURES—Controversy Between Landlord and Tenant.—Fixtures placed in a building by the tenant under an agreement that he may remove the same at the end of his term, do not become incorporated with the realty, but remain the personal property of the tenant, which, so long as he is in possession of the premises, he may lawfully remove or transfer to the succeeding tenant.—MORRISON v. SOHN, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

32. FRAUD AND DECEIT—Distinction Between Fraud as a Defense and as a Cause of Action.—It is not necessary to prove the false representations which induced the making of the contract out of which note in suit originated, were known to be false by the party making them in order to constitute a good defense. Even though made innocently they may be a good defense. And this, though the answer charges them to have been made knowingly. But to support a counterclaim in favor of defendant against plaintiff the representations must have been made with knowledge.—LIVE STOCK REMEDY CO. v. WHITE, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

33. FRAUD AND DECEIT—Proof.—If one makes a material misrepresentation in person or by agent, knowing it is not true; or makes a material statement as true, without knowing whether it is true or false and it turns out to be false, and the other party relies upon it and is thereby induced to trade, it is a fraud upon the latter party.—CHASE v. RUSK, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

34. HABEAS CORPUS—Review of Commitment—Scope of Remedy.—It is incompetent for the court in *habeas corpus* proceedings to review the facts on which the commitment was ordered, or the regularity merely of the proceedings which resulted in the commitment. If any error be committed in these respects, the remedy of the prisoner is by appeal from the order of commitment. — IN RE REESE, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 942.

35. HIGHWAYS—Abandonment — Town Council—Discretionary Power.—Where the owner of land through which a highway passed agreed with the board of aldermen that they would claim no damages by reason of its abandonment, and petitioned the board therefor, whereupon the board exercised the power of abandonment according to the prescribed statutory rules, the general public had no standing in court to complain of such abandonment. Under Gen. Laws, ch. 71, § 28, providing that town councils may abandon the whole or any part of a highway, the question of abandonment is left to the discretion of the town council or board, irrespective of the question whether or not the highway has ceased to be useful to the public generally. — ATTORNEY GENERAL v. SHEPARD, R. I., 49 Atl. Rep. 41.

36. JUDGMENTS— Collateral Attack — Eminent Domain — Rights Acquired by Condemnation — Special Statute.—A decree of a state court may be collaterally attacked in the federal courts for want of jurisdiction over the subject-matter or the person, but not for any error which does not affect such jurisdiction. Under a legislative act expressly authorizing a city to condemn under the power of eminent domain, in the manner provided by law, "all outstanding interest of every kind, character, or description, whether the same be legal or equitable, not owned by said city," in certain water works, such condemnation, when properly made, vests the city with absolute title to the interests condemned, and not merely an easement, measured by the need of the city to use the property for public purposes; and the title will not revert for nonuser.—WOOD v. CITY OF MOBILE, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 846.

37. JUDGMENT—Nunc Pro Tunc.—If the judge's docket shows judgment for a party without more, and the only judgment that can be rendered for said party is one in a particular form, the necessary inference is that such was the judgment intended by the judge, and the clerk's record will be made to conform to that intention. But if the judge's docket shows no judgment, but simply cites the return of a verdict by the jury giving its substance, no such inference arises, because the only judgment appearing in any of the records is that entered by the clerk, and the presumption in its favor controls.—BURNS v. SULLIVAN, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

38. JUDGMENT—Res Judicata.—A petition in a suit to enjoin a village and others from preventing the restoration of plaintiff's street railroad, removed by defendants for plaintiff's failure to comply with the ordinance which authorized its construction and operation, was based on an alleged compliance with such ordinance, but did not pray for damages. A demurrer to the petition for want of facts was overruled, and the court found, *inter alia*, that the rails, ties, etc., had been removed, piled up, and held at plaintiff's order, and in conclusion found, as a matter of law, a failure to comply with the ordinance, for which it expressly denied relief and dismissed the petition, and the decision was affirmed on appeal. Held, that the decree was conclusive in a subsequent action at law by plaintiff as to his right to damages for the removal, but not as to damages for the conversion of his property. — STEWART v. VILLAGE OF ASHTABULA, U. S. C. C. of App., Sixth Circuit, 107 Fed. Rep. 857.

39. LANDLORD AND TENANT — Lease — Failure to Give Possession.—In an action to recover damages for failure to give possession of leased property, the measure of damages is the difference between the leased rental value and the rent reserved, where the premises were necessary to the plaintiff for the purpose of carrying on a new business, since there could be no basis on which to estimate the profits. Where, in action to recover damages for failure to give possession of leased property, all the elements of damage alleged in the complaint were covered by the answers in the special verdict, with a single exception of an item of expense for loss of time in purchasing fixtures to utilize said premises, a general verdict in excess of the special verdict for

more than the item not covered by the special verdict will be reduced to the amount of such special verdict with the omitted item added.—ENGSTROM v. MERRIAM, Wash., 64 Pac. Rep. 914.

40. PUBLIC LANDS—Cutting and Removal of Timber.—The act of June 3, 1878, authorizing citizens and residents of the states of Colorado, Nevada and the territories, and "all other mineral districts of the United States," to fell and remove timber on the public domain, does not apply to the state of Oregon, there being no such mineral district.—UNITED STATES v. ENGLISH, U. S. C. C., D. (Ore.), 107 Fed. Rep. 867.

41. MARINE INSURANCE — Construction of Policy.—A marine insurance policy covered all shipments of oil from foreign ports to Philadelphia or Boston, or "via port or ports, and at and thence to Providence, with privilege of transshipment, including risk of craft to and from the ship or vessel; such craft to be considered a separate risk." The policy covered "leakage amounting to five per cent. on each barrel over ordinary leakage, which is agreed to be 2 per cent." Other provisions of the policy were: "Not liable for particular average, nor for leakage unless occasioned by stranding or collision with another vessel." "The perils which said insurance company takes on itself are of the seas, fires, pirates, and all other perils, losses, or misfortunes to the detriment of said goods." Held, that the contract authorized oil shipped from Mediterranean ports to Philadelphia or Boston to be carried over land from either place to Providence,—this being the shortest and safest route,—and hence that the company was liable for leakage under the policy, though there was nothing to show whether it occurred on land or water.—PHETTEPLACE v. BRITISH & FOREIGN MARINE INS. CO., R. I., 49 Atl. Rep. 33.

42. MARITIME LIENS—Charter Provisions—Lien of Owner on Cargo for Charter Money.—A provision in a time charter, which leased the ship for the term, and made the charterer owner for the voyages made thereunder, reserving to the owner, "a lien upon all cargoes and all subfreight for charter money due under this charter," cannot be construed to give the owner a lien upon cargo owned by third persons, and shipped under contract with the charterer, for charter money due; nor has he any lien on such cargo, under either the charter or the maritime law, to compel the shipper to pay the freight to him, such lien being created by the maritime law in favor of the person in possession of the ship. The only effect of such provision purporting to give the owner a lien upon cargo is to bind such cargo as is owned by the charterer to the extent of the charter money due.—AMERICAN STEEL-BARGE CO. v. THE CITY OF EVERETT, U. S. D. C., D. (Mass.), 107 Fed. Rep. 964.

43. MARITIME LIENS—Supplies Furnished in Foreign Port—Contract with Owner.—Where, under a contract with the owner, supplies are furnished to a vessel within the same port or state in which the contract is made, the presumption is that the dealings are not with the ship or upon her credit, but upon the personal responsibility of the owner; and no lien exists in such a case unless a credit of the ship is proved to be within the intention of the parties.—PRINCE v. OGDENSBURG TRANSIT CO., U. S. C. C., D. (Mass.), 107 Fed. Rep. 778.

44. MASTER AND SERVANT—Knowledge by the Latter of Danger.—In order for the knowledge by the servant of the condition of premises or machinery complained of to absolutely and unconditionally prevent his recovery as a matter of law, the condition must have been such as to threaten immediate danger, and that a man of ordinary prudence and caution would not have worked under said condition.—CARDWELL v. CHICAGO, ETC., RY. CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

45. MASTER AND SERVANT—Personal Injuries—Evidence.—Plaintiff, a servant, was injured by the fall of a derrick, due either to inherent weakness, improper ballasting, or violation of defendant's order not to hoist two loads at the same time on the same side of the derrick. The jury found against the last cause. Evidence tended to show that there was no visible weakness in the derrick, but that the accident may have been caused by a change of ballast, for which defendant would be responsible. Held, that a verdict for plaintiff was not against the evidence.—SHERMAN v. J. W. BISHOP CO., R. I., 49 Atl. Rep. 39.

46. MISTAKE OF LAW — Practice.—Where one of two joint defendants, against whom a judgment is rendered in the district court, appeals to the common pleas division of the supreme court, without joining his co defendant therein, under the belief that such joinder is not necessary, and the appeal is dismissed, it is a mistake of law, and is not sufficient to authorize the granting of a new trial in such court.—BASSETT v. LOWENSTEIN, R. I., 49 Atl. Rep. 39.

47. MORTGAGES — Assignment — Subsequent Incumbrancer.—A note secured by a mortgage was indorsed before maturity by the payee to L, and thereafter, but before the note matured, the payee released the mortgage of record. L indorsed the note to a partnership, and after maturity it was sold under an order of court as partnership assets, and purchased by plaintiff, who had no knowledge of the release of the mortgage. Held, that the fact that plaintiff purchased the note after maturity did not postpone his lien in favor of a subsequent *bona fide* incumbrancer of the mortgaged property, on the ground that plaintiff was estopped from denying actual knowledge of the release as shown by the record, since plaintiff was entitled to assert the rights of L.—FISCHER v. WOODRUFF, Wash., 64 Pac. Rep. 928.

48. MUNICIPAL CORPORATIONS — City Printing—Award.—Allegations that a city charter provided that bids should be submitted for the city printing, and that the city council should accept the lowest proposal, and appoint the bidder city printer; and that plaintiff filed a bid to do the city printing for 21 cents per inch for the first insertion, and 20 cents per inch for each subsequent insertion; and that plaintiff's competitor bid 35 cents per inch for the first insertion, and 30 cents per inch for subsequent insertions, measure to be by nonpareil type, matter set solid; and that the city council appointed plaintiff's competitor city printer on the ground that plaintiff's bid was ambiguous; and that there was a general custom that printing was to be measured by nonpareil type set solid, and that plaintiff's bid was made with reference thereto; and that the city council maliciously and fraudulently accepted the bid of plaintiff's competitor with the intention to defraud plaintiff,—stated facts sufficient to constitute a cause of action.—TIMES PRINTING CO. v. CITY OF SEATTLE, Wash., 64 Pac. Rep. 940.

49. MUNICIPAL CORPORATIONS—Liability for Grading—Ordinance.—Plaintiff seeks to recover from the defendant city, damages alleged to have been caused by the grading of a certain street of said city. The grading was done by the street commissioner under the direction of the city council. The city's charter authorized it to enact ordinances for grading and improving its streets. There was in this instance no ordinance enacted. Held, that the city was not liable; it could act only by ordinance and no ordinance had been enacted.—KOEPPEN v. CITY OF SEDALIA, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

50. MUNICIPAL CORPORATIONS—Police Commissioners—State Officers.—The board of police commissioners for the city of Newport, appointed by the governor by and with the consent of the senate, is a state board or commission, within Gen. Laws, ch. 17, § 4, providing that the attorney general, whenever requested, shall act as the legal advisor of all state boards, and shall represent such boards in litigation, since the duties of such commissioners are of a general nature, rather than municipal.—IN RE POLICE COMRS., R. I., 49 Atl. Rep. 37.

51. NEGLIGENCE—Duty of One Injured to Call a Physician.—An injured person does not at his peril have to call in a physician, he is not called upon to do more than exercise reasonable care to prevent an aggravation of his injuries.—WEBB v. RAILWAY CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

52. NEGLIGENCE—Right of Judgment Defendant to Recover Over.—A judgment was recovered against an electric street-railroad company for damages for causing the death of the plaintiff's husband, who was killed by receiving an electric shock from a telephone wire which he was required to handle in the course of his work as an employee of the telephone company; the complaint in the action alleging that the charge of electricity which killed the deceased was received from a feed wire of defendant, which it negligently permitted to cross and rest upon the telephone wire. Having paid the judgment, the railroad company brought an action to recover over against the telephone company, alleging that the crossing of the wires was due to the negligence of the latter company. Held, that such action could not be maintained, since the judgment upon which it was based was necessarily recovered upon an adjudication that the railroad company had been guilty of actual and positive negligence, which rendered it at least a joint tort-feasor, and precludes it from recovering over.—ATLANTA CONSOL. ST. RY. CO. v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO., U. S. C. C., N. D. (Ga.), 107 Fed. Rep. 874.

53. PARTNERSHIP—Accounting.—Where a partner misappropriates funds of his firm, and falsifies its accounts, he will be required to account to his partner for all damages thereby sustained by the firm, together with interest, and then allowed to retain his portion of the partnership assets.—BINGHAM v. KEYLOR, Wash., 64 Pac. Rep. 942.

54. PLEADING AND PRACTICE—Justice Court—Statement.—A statement before a justice of the peace must set out the facts constituting plaintiff's cause of action, and show the nature thereof, as for example whether it is based upon contract or negligence.—REDMON GRAIN CO. v. RAILROAD, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

55. PLEADING AND PRACTICE—Party in Interest.—In a suit by the assignee of G, the buyer of certain warrants subsequently found to be void, to recover the price paid therefor, evidence that the buyer signed the check given in payment, "G, Agent," and that his wife's money was kept in bank under that account, and that all the money G used in his business was kept under the same account, and that both G and his wife signed the assignment of the claim arising out of such sale of the warrants, did not establish that G's wife, and not G, was the real party in interest in such sale; and plaintiff was not, therefore, subject to be nonsuited for failure of the complaint to allege G's wife as the real purchaser.—LATIMER v. BAKER, Wash., 64 Pac. Rep. 898.

56. PLEDGES—Foreclosure—Title.—Where the pledgee of city warrants sold them at public sale to itself for a small fraction of their face value, at a time when the warrants had no market value because their validity was disputed by the city, and when the receiver of the insolvent pledgor had no money to pay the debt, the sale being solely to secure title to the warrants, so that the pledgee could handle them more conveniently, and not for the purpose of paying the debt, such sale conveyed no title, and the receiver was entitled to redeem the warrants by payment of the debt and proper expenses incurred by the pledgee.—MUHLENBERG v. CITY OF TACOMA, Wash., 64 Pac. Rep. 925.

57. PRINCIPAL AND AGENT—Contracts—Rescission—Authority.—Where the president of a corporation would profit by the rescission of a contract made on behalf of himself and others with the corporation, the fact that he made the contract for the company would give him no authority to rescind it, to the detriment of his principal.—WALLACE v. OCEANIC PACKING CO., Wash., 64 Pac. Rep. 938.

58. PUBLIC LANDS—Cancellation—Notice.—Public lands were entered under 20 Stat. 89, providing for sale on application stating that such lands were unfit for cultivation, and valuable chiefly for stone or timber, and all requirements thereof were complied with. The entrymen conveyed the tracts to defendant by warranty deeds recorded in the auditor's office of the county where the lands were located. The land department, before instituting proceedings to cancel the entries, was notified by its agent of the transfers. On *ex parte* hearing, the commissioner of the general land office canceled the entries, and issued patents to the land to plaintiff's grantors. Held, that defendant was entitled to notice of the proceedings for cancellation.—WHITNEY v. SPRATT, Wash., 64 Pac. Rep. 919.

59. PUBLIC LANDS—Cutting Timber—Act Prohibiting—Cutting for Use in Quartz Mill.—The proviso to the act of June 3, 1878, § 4, prohibiting the cutting and removal of timber on the public domain, provides that it shall not prevent any miner from clearing land in working his claim, or from taking timber to support his improvements. Held, that the taking of the timber for use in a quartz mill adjacent to the land from which it was cut was not within the proviso, and hence was prohibited by the act.—UNITED STATES v. ENGLISH, U. S. C. C., D. (Oreg.), 107 Fed. Rep. 867.

60. RAILROADS—Liability for Killing Cattle.—It is the duty of a railroad company in operating its trains to be on the lookout for cattle at public road crossings, and it is liable for running down such animals thereat, not only if it saw them in time to have avoided the accident, but also if it could have so seen them by the exercise of ordinary care. This applies to a cow which was on such crossing and having been frightened by an approaching train ran down the track for about 200 yards where she was struck.—SPENCER v. M., K. & T. RY., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

61. SALE—Construction of Contract.—A sale of all the ice in certain ice houses, for a price based upon the quantity shown by an agreed survey made before the contract was reduced to writing, is a sale in bulk, and not of the quantity shown by the survey.—GAGE v. CARPENTER, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 886.

62. SALE—Implied Warranty—Contract Construed.—Defendant sold to plaintiff in bulk all the ice stored in certain ice houses, with the understanding that plaintiff purchased it to resell in the general course of the ice business in a city. Defendant did not put up the ice, but bought it after it was stored, and had never seen it, and so stated to plaintiff, also telling him from whom he purchased it, and that he had no other information as to its condition or quality than the statements of such seller. Held, that under such circumstances there was no implied warranty by defendant that the ice was all of merchantable quality.—GAGE v. CARPENTER, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 886.

63. SALES—Implied Warranty of Quality.—An implied warranty by a seller of an article which is in existence, as to quality or against defects which are not obvious, arises only where the circumstances are such as entitle the buyer to rely upon the knowledge or opportunity of inspection which the seller possesses and he does not possess.—GAGE v. CARPENTER, U. S. C. C. of App., First Circuit, 107 Fed. Rep. 886.

64. SCHOOL AND SCHOOL LANDS—Rescission—Tax Sale.—Where a state canceled a sale of school lands for nonpayment of installments due on the purchase price, a purchaser under a subsequent sale for county taxes acquires no interest in the lands.—STATE v. FROST, Wash., 64 Pac. Rep. 899.

65. STATUTE OF FRAUDS—Pleading.—When the contract is not denied, the statute of frauds must be specifically pleaded; but if denied, the statute may be in-

voked at the trial without being specifically pleaded. The defense, however, is an affirmative one, and even when the contract is denied the defense will be deemed waived unless it is timely presented. The defense ought to be urged by objecting to the evidence, or by demurrer to the evidence, or in some such way. If no such objection is made, but on the contrary, defendant introduces evidence to disprove the contract, the defense of the statute will be held to have been waived, even though defendant raises it by instructions asked at the close of the whole case.—ROYAL REMEDY AND EXTRACT CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

66. STREETS — Public Use — Loading and Unloading Freight.—The appropriation, whether by custom or ordinance, of a street adjacent to a railroad freight house to the use of teams, trucks and wagons in loading and unloading merchandise, is a legitimate public use of the street, of such importance that a mere trespasser, seeking to interfere therewith, should receive scant favor from a court of conscience.—GENERAL ELECTRIC RY. CO. V. CHICAGO, I. & L. RY. CO., U. S. C. C. of App., Seventh Circuit, 107 Fed. Rep. 771.

67. TAXATION — Defaulting Tax Collector — Commissions—Rights of Sureties.—Code, Alabama 1896 § 4097, provides that a collector of taxes may retain his commissions when he makes payment into the state treasury. Section 4037 provides that he must also, on or before January 10th and April 10th in each year, account to the auditor under oath for the amount of taxes, etc., and on such accounting shall be allowed by the auditor the amount then due him for commissions, fees, etc. Held, both in view of the statute, and independent thereof, that a defaulting tax collector was not entitled to commissions on money which he failed to pay over, and his sureties could not claim a credit therefor.—WALKER COUNTY, ALA. V. FIDELITY & DEPOSIT CO. OF MARYLAND, U. S. C. C. of App., Fifth Circuit, 107 Fed. Rep. 851.

68. TRUSTS AND TRUSTEES—Duties and Liabilities of Trustee.—A syndicate was formed for the purpose of purchasing certain stocks and real estate owned by one of the members, at agreed prices. Some of the members contributed their proportion of the required fund, which was placed in the hands of one of their number as custodian. An executive committee was also created. After a time the seller insisted that the purchase should be completed or the option surrendered, and the custodian paid over to him the fund collected. The seller conveyed to the custodian a portion of the property, which at the option price exceeded in value the amount he received, and also a large amount of the stocks, subject to a pledge thereof to secure an indebtedness which the contributions due from the remaining members of the syndicate were more than sufficient to meet. The project was subsequently abandoned, and nothing further was done toward carrying out the plans of the syndicate. Held, in a suit by members of the syndicate against the legal representatives of the seller and the custodian after their deaths, that it must be presumed, in the absence of evidence to the contrary, that the custodian paid over the money by direction of the executive committee, and with the knowledge and consent of all the persons concerned, and, there being no evidence of bad faith, that neither he nor the seller who received it could be charged with liability for its misappropriation, under the circumstances.—HOGG V. HOAG, U. S. C. C., S. D. (N. Y.), 107 Fed. Rep. 807.

69. UNITED STATES COURTS—Amount in Controversy—Joinder of Causes of Action.—A federal court has jurisdiction of an action at law between citizens of different states to recover an amount in excess of $2,000, based upon a number of separate claims, some of which were assigned to the plaintiff by others, where the joinder of such claims is permitted by the statute of the state, and the assignors were all residents of states other than that of defendant's residence, although no one of the claims is alone sufficient in amount to give the court jurisdiction.—BRIGHAM-HOPKINS CO. V. GROSS, U. S. C. C., D. (Wash.), 107 Fed. Rep. 769.

70. UNITED STATES COURTS — Intervention—Refusal—Granting Appeal as of Course.—There being two kinds of intervention, one belonging to the class of cases in which leave to intervene is entirely discretionary, and the other to that class in which the right is absolute, and it being sometimes difficult to determine to which a particular intervention belongs, the correct practice for a chancellor, after refusing leave to intervene, is to grant an appeal as a matter of course, if prayed for, as the intervenor otherwise would be entirely without remedy if the refusal should be a mistake.—UNITED STATES V. PHILIPS, U. S. C. C. of App., Eighth Circuit, 107 Fed. Rep. 824.

71. UNITED STATES COURTS — Jurisdiction of Removed Cause — Diverse Citizenship.—Though the circuit court cannot acquire jurisdiction by original process issued therefrom in a controversy between citizens of different states unless defendant is a resident of the district, yet where defendant, pursuant to the statute of removal, has a cause removed from the state to the federal court on the ground of diverse citizenship of the parties without regard to the residence of defendant, the latter cannot thereafter object to jurisdiction on account of its non-residence in the district.—WOODCOCK V. BALTIMORE & O. R. CO., U. S. C. C., N. D. (Ohio), 107 Fed. Rep. 767.

72. VERDICT—Compensatory and Punitive Damages Separately Stated.—Jury, in their verdict, under section 595, Rev. St., should state separately the compensatory and punitive damages, and where both kinds of damages are claimed by plaintiff and the jury return a verdict finding in his favor generally and in a lump sum, such verdict is bad.—JOHNSON V. BEDFORD, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

73. WILLS—Devise—Life Estate.—The title in question depended upon a will which contained, among others, the following provision: "It is my will that if any of my children or grandchildren should die without issue, I wish their share to be equally divided among my remaining heirs, and so as to all my children and grandchildren." Held, that the devisees received only a life estate. Cross v. Hoch, 149 Mo. 325, discussed and held to be just in point.—KRULL V. LEA, Mo. App. (K. C. Div., May 6, 1901, not yet reported.)

74. WILLS — Rule in Shelley's Case — Modification.—Pub. St. ch. 181, § 2, provides that no person seised in fee simple shall have a right to devise any estate in fee tail for a longer time than to the children of the first devisee, and a devise for life to any person and to the children or issue generally of such devisee, in fee-simple, shall not vest a fee-tail estate in the first devisee, but an estate for life only, and the remainder shall, on his decease, vest in his children or issue generally, agreeably to the direction of such will. Testator provided that after the decease of his wife, S, one-third of his estate should go to his son, C, for and during the term of his natural life, and that after his decease the estate so given as a life estate should go to the heirs of C, and to their assigns, forever. Held, that an estate in fee-simple was vested in C on the death of S.—IN RE MANCHESTER, R. I., 49 Atl. Rep. 36.

75. WITNESSES — Physician and Patient — Privilege Waived.—The provisions of the statute (Sec. 4659, Rev. St.) rendering physicians incompetent to testify to information acquired by them from their patients and which was necessary to enable them to prescribe for and treat said patients create a privilege in favor of the patients which they may lawfully waive. Thus where the patient goes upon the stand and fully testifies to all the secrets of the sick room, telling what was done by the physician and all about the treatment, he thereby waives the privilege of the statute, and the opposite party has the right to call the physician as a witness and to examine him in relation to the matter.—WEBB V. RAILWAY CO., Mo. App. (K. C. Div., May 6, 1901, not yet reported.)